TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 171

LOUIS PIZITZ DRY GOODS COMPANY, INC., PLAINTIFF IN ERROR,

vs.

WILLIS YELDELL, AS ADMINISTRATOR OF THE ESTATE OF CARRIE YELDELL, DECEASED

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

FILED JULY 13, 1926

(31,329)

(31,329)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 606

LOUIS PIZITZ DRY GOODS COMPANY, INC., PLAINTIFF IN ERROR,

vs.

WILLIS YELDELL, AS ADMINISTRATOR OF THE ESTATE OF CARRIE YELDELL, DECEASED

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

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[fols. 1-3] [Caption omitted]

[fol. 4] **IN CIRCUIT COURT OF JEFFERSON COUNTY**

SUMMONS

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summons Louis Pizitz Dry Goods Company, Inc., a corporation, to appear before Circuit Court, to be held for said County, at the place of holding the same, within thirty days from service of this process, then and there to answer the complaint of Willis Yeldell as Administrator of the Estate of Carrie Yeldell, deceased.

Witness my hand, this 15 day of March, 1924.

Woolsey Morrow, Clerk.

IN CIRCUIT COURT OF JEFFERSON COUNTY

BILL OF COMPLAINT—Filed March 15, 1924

Plaintiff, Willis Yeldell, who sues as Administrator of the Estate of Carrie Yeldell, deceased claims of the defendant, Louis Pizitz Dry Goods Company, Inc., a corporation, Twenty Five Thousand ($25,000.00) Dollars as damages for that heretofore on, to-wit: February 25, 1924, the defendant company was doing business in the City of Birmingham, Jefferson County, Alabama, said business being in the nature of a dry goods store on Second Avenue and Nineteenth Street in the City of Birmingham, Alabama. Plaintiff avers that Carrie Yeldell, deceased, entered into said dry goods store on, to-wit: February 25, 1924, and while in said store entered into an elevator which was operated by the defendant company. Plaintiff avers that said elevator was operated by an agent of the defendant company whose name is unknown to the plaintiff. Plaintiff avers that while said agent was operating said elevator at the time and place aforesaid and while acting within the line and scope of her employment as operator of said elevator, said agent did negligently operate said elevator in such a manner as to cause the same to strike the body of the plaintiff's intestate, thereby mashing, bruising and lacerating plaintiff's intestate so that she died. Plaintiff avers that the death of the plaintiff's intestate was the proximate result of the negligence of the agent or servant of the defendant company who was then and there in charge of said elevator, said negligence proximately causing the death of plaintiff's intestate, hence the plaintiff sues.

Beddow & Ray, Attorneys for Plaintiff.

Plaintiff demands a trial by jury in said cause.

Beddow & Ray, Attorneys for Plaintiff.

[fol. 5] IN CIRCUIT COURT OF JEFFERSON COUNTY

SHERIFF'S RETURN TO SUMMONS

Executed this the 18 day of Mch., 1924, on Louis Pizitz Dry Goods Co., Inc., a corp., by leaving a copy of within with Sam Micheal, Mgr., of said Company.

T. J. Shirley, Sheriff, by W. S. Shepherd, D. S.

IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER—Filed March 22, 1924

Comes the defendant and demurs to the complaint filed herein, and for grounds of demurrer sets down and assigns the following:

1. For that it does not state facts sufficient to constitute a cause of action against this defendant.

2. For that negligence is therein alleged merely as a conclusion of the pleader.

3. For that it is vague, indefinite and uncertain, in that it does not apprise this defendant with sufficient certainty against what act or acts of negligence the defendant is called on to defend.

4. For that it does not appear with sufficient certainty what duty, if any, the defendant may have owed to the plaintiff.

5. For that it does not appear with sufficient certainty wherein defendant violated any duty the defendant may have owed to the plaintiff.

6. For that it does not sufficiently appear that the defendant owed any duty to the plaintiff which the defendant negligently failed to perform.

7. For that the averments set up, if true, do not show any liability on the part of the defendant herein.

8. For that the pleader sets out in what said alleged negligence consisted, and the facts so set out do not show negligence.

9. For that there does not appear sufficient causal connection between defendants said alleged breach of duty and plaintiff's injuries and damages.

Engel & Mudd, Attorneys for Defendant.

[fol. 6] IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDMENT TO BILL OF COMPLAINT—Filed Oct. 30, 1924

Now comes the plaintiff in the above styled cause by his attorneys and with leave of Court first had and obtained amends the complaint heretofore filed in said cause by adding the following count thereto:

Count "A"

Plaintiff, Willis Yeldell, who sues as administrator of the estate of Carrie Yeldell, deceased, claims of the defendant, Louis Pizitz Dry Goods Company, Inc., a corporation, Twenty Five Thousand ($25,000.00) Dollars as damages for that heretofore on, to-wit February 25, 1924, the defendant was doing business in the City of Birmingham, Alabama, on Second Avenue and Nineteenth Street in said City, said business being what is commonly known as a dry goods store, where goods are sold for money to the public. Plaintiff avers that the defendant operated an elevator in connection with the operation of said dry goods store, said elevator being operated as a carrier of passengers.

Plaintiff avers that said Carrie Yeldell, deceased, was at the time of said injury a customer in said dry goods store for the purpose of trading.

Plaintiff avers that on, to-wit: the 25th day of February, 1924, plaintiff's intestate, the said Carrie Yeldell, deceased, entered the said elevator as a passenger, said elevator being at the time operated by an agent of the defendant company, the name of said agent being to the plaintiff unknown. Plaintiff avers that said agent while so operating said elevator, and while acting within the line and scope of her employment as such agent, did negligently cause or allow said elevator to collide with the body of plaintiff's intestate. Plaintiff avers that the body of Carrie Yeldell, Plaintiff's intestate was mashed, bruised and lacerated so that she died.

Plaintiff avers that all of said injuries and damages complained of were caused by reason of and as a proximate consequence of the negligence of the said agent of the defendant company who was then and there in charge of the operation of said elevator, said negligence consisting in this: That said agent did negligently cause or allow the said elevator to collide with plaintiff's intestate, which said negligence proximately caused the injuries and damages complained of, and hence the plaintiff sues.

Beddow & Ray, Attorneys for Plaintiff.

[fol. 7] In Circuit Court of Jefferson County

Supplemental Demurrer—Filed Oct. 30, 1924

Comes the defendant, and files the same grounds of demurrers to the complaint as amended, as were heretofore filed to the complaint in this cause, and in addition thereto adds the following additional grounds of demurrers to the complaint as amended.

1. That it appears from the averments thereof that plaintiff's cause of action is based wholly upon a statute known as Section 2486 of the Code of Alabama of 1907, as amended, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law.

2. For that it appears from the complaint and each count thereof that the plaintiff's cause of action is based wholly upon a statute known as Section 2486 of the Code of Alabama of 1907 as amended, which statute is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law.

3. For that said complaint and each count thereof, although claiming punitive damages alone, does not charge the defendant with any willful misconduct or with that entire want of care which would raise the presumption of a conscious indifference to consequences.

4. That it appears from the averments thereof that plaintiff's cause of action is based wholly upon a statute known as Section 5696 of the Code of Alabama of 1923, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law.

5. For that it appears from the complaint and each count thereof that the plaintiff's cause of action is based wholly upon a statute known as Section 5696 of the Code of Alabama of 1923, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States for that it would deprive the defendant of its property without due process of law.

6. For that it does not appear what duty, if any, the defendant owed to the plaintiff which defendant negligently failed to perform.

[fol. 8] J. P. Mudd, Attorney for Defendant.

IN CIRCUIT COURT OF JEFFERSON COUNTY

PLEA OF GENERAL ISSUE—Filed Oct. 30, 1924

Comes the Defendant and for answer to the Complaint in this cause pleads in short by consent the general issue, with leave to give in evidence any matter, which if well pleaded, would be admissible in defense of the action, to have effect as if so pleaded; and with leave to the Plaintiff to give in evidence any matter, which if well pleaded, would be admissible in reply to such defensive matter, to have effect as if so pleaded.

J. P. Mudd, Attorney for Defendant.

In Circuit Court of Jefferson County

Charge to Jury

"Gentlemen of the jury, this is an action by Willis Yeldell, administrator of the estate of Carrie Yeldell, deceased, against Louis Pizitz Dry Goods Company, a corporation.

The complaint before you for your consideration consists of Count A. I believe that is the way you numbered that amended count.

Mr. Ray: Yes, sir.

The Court: Count A is the only count you have before you for your consideration, and it is a suit by the administrator of this intestate—that is, the deceased person—for damages against this defendant; and they base their claim upon the negligence of a servant or agent in the employment of the defendant company in the operation of an elevator which was used by this defendant in carrying passengers and customers of that store from one floor to another. Very simple; that is all there is to it.

Now, the facts are undisputed in this case that this defendant was operating this store. They invited customers to come there to trade at this store, and to use this elevator, and when these parties came [fol. 9] there for the purpose of trading with this defendant, and used this elevator, they became passengers on this elevator, and there was between this defendant and this deceased party at the time the relation of passenger and carrier. In other words, the law charged this defendant company with the same duty that would be exercised by a common carrier of passengers.

Now, the law laid down in this State in regard to that is that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers, and are required to exercise the highest degree of care, skill and diligence in and about the operation of such elevators to prevent injury to passengers being carried therein. That is the degree of care which they are required to exercise by the law.

Negligence is the gist of this action, and the burden of proof is on the plaintiff to prove to your reasonable satisfaction such facts from which can be reasonably and fairly inferred that the negligence of the defendant was the proximate cause of the alleged injuries; and when I say negligence of the defendant, I mean the negligence of any servant or agent in the employ of the defendant, acting within the line and scope of their employment at the time.

Negligence is the failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done under the same or similar circumstances.

Now, it is not every act of negligence which gives a right of action when an accident has happened; but that negligence must have been the proximate cause of an accident. To constitute actionable negligence there must be causal connection between the negligence complained of and the injury suffered; and for the negligence to be the proximate cause of the injury, it must first appear that there was

a duty owing from the defendant to the plaintiff, that there was a negligent breach of that duty, and that the injury resulted as a direct consequence of such breach. I just told you that negligence would have to be the proximate cause of the injury. Now, proximate cause as applied to negligence is such a want of ordinary care as a natural and continuous consequence, unbroken by any intervening, independent cause, results in injury, without which such injury would not have occurred.

[fol. 10] Now, that is the law as I conceive it to be in this case—whether or not this party was negligent as applied to the law requiring them to exercise the highest degree of care, skill and diligence in conserving the safety of those who were on the elevator.

Now, if you are reasonably satisfied from the evidence in this case that the plaintiff is entitled to recover, the measure of damages as laid down by the law is whatever amount you may in your sound discretion assess, not to exceed the amount claimed in the complaint.

You have heard all the evidence in the case, and you are the sole judges of the facts; and you are entrusted with the task of sifting the truth from all the circumstances, and the law declares that that function shall not be invaded by the court. The judge is required to refrain from expressing his own views as to the facts, from intimating to the jury what weight shall be given to particular testimony, and from assuming the existence of facts not clearly admitted by both parties to the litigation. The province of the Court is to state and apply the law to the facts in the particular case so that it may be readily understood by the mind untrained in the law. The jury is the sole judge of the credibility of witnesses, and the court should not express, or even intimate, an opinion as to the credibility of the witnesses. But the jury cannot arbitrarily disregard the testimony of any witness in the absence of anything to discredit or contradict it. Where conflicting statements of the happening of an event have been testified to, it is the duty of the jury to reconcile the testimony if possible so as to make all the witnesses speak the truth without attributing perjury to any of the witnesses. The jury may consider any interest the witness may have in the case, and you have a right to determine from the appearance of witnesses on the stand, their demeanor and manner of testifying, and from all the other surrounding circumstances appearing on the trial what credibility you will give to their testimony.

Your belief as to where the truth lies on disputed questions of fact should be based on the evidence as adduced from the witness stand in this case, and you have no right to indulge in speculations not supported by the evidence. You are to apply to the facts in the case your sound common sense such as you would in your daily business and the every day affairs of life."

Immediately after the giving of said charge, the defendant, in open court and in the presence of the jury before its retirement, duly excepted to that portion of the Court's oral charge, reading as [fol. 11] follows:

Now, if you are reasonably satisfied from the evidence in this case that the plaintiff is entitled to recover, the measure of damages as laid down by the law is whatever amount you may in your sound discretion assess, not to exceed the amount claimed in the complaint."

IN CIRCUIT COURT OF JEFFERSON COUNTY

DEFENDANT'S REQUESTED INSTRUCTIONS GIVEN TO JURY

7. I charge you, that whether or not the defendant was guilty of negligence in operating the elevator car without the inner door being closed would depend upon the circumstances surrounding its operation.

Given, Denson, J.

10. If you believe from the evidence that the plaintiff's intestate fell forward to the floor of the elevator from some cause independent of the operation of the elevator car itself and that after falling to the floor she had died before being mashed, then your verdict must be for the defendant.

Given, Denson, J.

5. I charge you that if you believe from the evidence that the plaintiff dropped dead from a defective heart or other ailment having no relation to her ride upon the elevator, and that after dying her body fell in such position as to be wedged between the elevator floor and the elevator shaft, that the plaintiff cannot recover.

Given, Denson, J.

E. I charge you, that if you believe from the evidence that the operator of the elevator on which the plaintiff's intestate was killed, was a competent and skillful operator and was operating said elevator at the time with that degree of care which a skillful and competent operator would exercise, that you must find your verdict for the defendant.

Given, Denson, J.

IN CIRCUIT COURT OF JEFFERSON COUNTY

DEFENDANT'S REQUESTED INSTRUCTIONS, REFUSED

4. I charge you that it was not negligence per se to operate an elevator of the kind upon which the plaintiff was killed without closing the inner doors.

Refused, Denson, J.

13. I charge you that under the complaint in this cause you cannot assess punitive damages against the defendant.

Refused, Denson, J.

[fol. 12] 2. If you believe the evidence in this case you cannot find your verdict for the plaintiff.

Refused, Denson, J.

11. I charge you, that the defendant is not an insurer of the safety of passengers lawfully upon its elevators, but is required only to use reasonable care under the circumstances to protect them from injury resulting from the operation of the elevator car.

Refused, Denson, J.

12. I charge you that under the complaint in this cause, in determining what you shall assess as damages, that you cannot assess punitive damages but are confined to compensatory damages, that is, such damages as may adequately compensate for the actual loss sustained to the plaintiff in this cause.

Refused, Denson, J.

6. I charge you that if you believe from the evidence that an ordinarily reasonable and prudent person would have operated an elevator under circumstances similar to those under which the plaintiff's intestate was killed, without closing the inner elevator doors, then you must find your verdict for the defendant.

Refused, Denson, J.

9. If from the evidence you believe that the defendant's agent or servant was operating the elevator car with that degree of care, prudence and skill which an ordinarily careful and prudent man would have done under similar circumstances you must find your verdict for the defendant.

Refused, Denson, J.

14. I charge you that unless you believe from the evidence that the defendant's operator was guilty of wantonness in and about the operation of the elevator at the time the plaintiff's intestate was killed, that you cannot find your verdict against the defendant.

Refused, Denson, J.

3. I charge you, that it was not negligence as a matter of law for the defendant to operate the elevator under the circumstances as shown by the evidence without closing the inner doors.

Refused, Denson, J.

1. If you believe the evidence in this case you must find your verdict for the defendant.

Refused, Denson, J.

[fol. 13] F. I charge you, that unless you believe from the evidence that the defendant itself was guilty of some negligence on the occasion complained of over and above the negligence of the elevator operator herself, that you must find your verdict for the defendant.

Refused, Denson, J.

16. I charge you, that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of wilful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff.

Refused, Denson, J.

15. I charge you, that if you believe the evidence in this case you cannot award the plaintiff more than nominal damages.

Refused, Denson, J.

16. I charge you, that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of wilful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff.

Refused, Denson, J.

8. If you believe from the evidence that the elevator car was not crowded at the time that the plaintiff's intestate was killed, then it was not the duty of the defendant's agent or servant to operate the elevator car with the inside doors closed, unless an ordinarily prudent man under like circumstances would not have operated said car with the doors open.

Refused, Denson, J.

D. I charge you, that if you believe from the evidence that the defendant, prior to the accident in this cause, exercised the highest degree of care which a careful and prudent man could exercise in the selection of an operator to run the elevator on the occasion when the plaintiff's deceased was killed, and exercised the same degree of care in installing the elevator and elevator equipment and keeping the same in good condition and free from defects, that you must find your verdict for the defendant.

Refused, Denson, J.

[fol. 14] C. I charge you that if you believe from the evidence in this case that the defendant exercised the highest degree of care in the selection of elevator equipment used on this occasion and

employed competent and skillful engineers to install the same and thereafter competent and skillful experts to inspect said elevator equipment at regular and frequent intervals just prior to the accident to guard against any defects or faulty construction or faulty operation and such examination by said experts failed to find any defects or faults in construction or operation, your verdict must be for the defendant.

Refused, Denson, J.

B. I charge you, that if you believe from the evidence in this case that the defendant used the highest degree of care known to mankind in the selection of a competent elevator operator to run its elevator on the occasion complained of, and used the highest degree of care known to man to provide safe elevators for the transportation of persons using said elevators in their store, either as customers or by their invitation or request, you must find your verdict for the defendant.

Refused, Denson, J.

A. I charge you, that the defendant's only duty to persons using its elevators in its store, either as customers or by their invitation or request, is to use all reasonable means and efforts to furnish good and well-constructed elevators and elevator equipment adapted to the purposes of its use, of good material and of the kind which is found to be safest when applied to use, and to keep said elevators and equipment in perfect repair and to use due and ordinary care in the selection of skillful and competent operators for operating said elevators; and if you find from the evidence in this case that the defendant has performed these duties you must find your verdict for the defendant.

Refused, Denson, J.

18. I charge you, that if you believe from the evidence that the elevator on the occasion complained of was operated in an ordinarily careful and prudent manner you must find your verdict for the defendant.

Refused, Denson, J.

17. I charge you that unless you believe from the evidence that some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of plaintiff's intestate, or subsequently ratified the negligent act of the operator which con-
[fol. 15] tributed to the death of plaintiff's intestate, you cannot find your verdict against the defendant.

Refused, Denson, J.

19. I charge you, that the failure to have the inner doors of the elevator closed at the time of the accident complained of cannot be considered as the proximate cause of the death of plaintiff's intestate.

Refused, Denson, J.

I charge you, that if you believe from the evidence there was no sudden start or jerk which caused the plaintiff to fall to the floor of the elevator car, when you must find for the defendant.

Refused, Denson, J.

17. I charge you, that unless you believe from the evidence that some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of plaintiff's instestate, or subsequently ratified the negligent act of the operator which contributed to the death of plaintiff's intestate, you cannot find your verdict against the defendant.

Refused, Denson, J.

If you believe from the evidence that the plaintiff's intestate was thrown to the floor of the elevator car by a sudden jerk or start, and if you further believe from the evidence that said jerk or start was not due to any lack of due care on the part of the defendant itself, you must find your verdict for defendant.

Refused, Denson, J.

IN CIRCUIT COURT OF JEFFERSON COUNTY

JUDGMENT—Oct. 30, 1924

It is ordered and adjudged by the court that said demurrer be and the same is hereby sustained; plaintiff amends complaint by separate paper filed; defendant refiles demurrer to complaint as amended and also additional grounds of demurrer; the demurrer to complaint as amended is by the court heard and considered, whereupon,

It is ordered and adjudged by the court that said demurrer be and the same is hereby overruled; defendant pleads in short by consent the general issue etc., and issue being joined, thereupon came a jury of good and lawful men, to-wit: C. W. Cole and eleven others who [fol. 16] being duly empaneled and sworn according to law upon their oaths do say: "We, the jury find for the plaintiff and assess his damages at the sum of Ninety-five Hundred ($9,500.00) Dollars," whereupon,

It is ordered and adjudged by the court that the plaintiff have and recover of the defendant the sum of Ninety Five Hundred ($9,500.00) Dollars, the amount of plaintiff's debt and damages as ascertained and assessed by the jury upon the proof produced upon the trial of this cause, besides all costs herein accrued for which execution may issue.

In Circuit Court of Jefferson County

No. 31179

"Willis Yeldell, as Administrator of the Estate of Carrie Yeldell, Plaintiff,

vs.

Louis Pizitz Dry Goods Co., Inc., a Corporation, Defendant

Motion for a New Trial

Comes now the defendant, by its attorney, and moves the Court to set aside the verdict rendered in this cause and to set aside the judgment rendered in this cause, on, to wit: the 30th day of October, 1924, and that the defendant be granted a new trial in said cause, and for grounds of said motion the defendant specifies the following, separately and severally, to wit:

1. The verdict of the jury was grossly excessive.

2. The verdict of the jury was contrary to the evidence in the case.

3. The verdict of the jury was contrary to the preponderance of the evidence.

4. The verdict of the jury was contrary to the law.

5. The judgment of the court was contrary to the law.

6. The judgment of the court was contrary to the preponderance of the evidence.

7. The judgment of the court was contrary to the law and the preponderance of the evidence.

8. The Court erred in overruling the defendant's demurrer to the amended complaint, stated as follows:

[fol. 17] "1. For that it does not state facts sufficient to constitute a cause of action against this defendant.

2. For that negligence is therein alleged merely as a conclusion of the pleader.

3. For that it is vague, indefinite and uncertain, in that it does not apprise this defendant with sufficient certainty against what act or acts of negligence the defendant is called on to defend.

4. For that it does not appear with sufficient certainty what duty, if any, the defendant may have owed the plaintiff.

5. For that it does not appear with sufficient certainty wherein defendant violated any duty the defendant may have owed to the plaintiff.

6. For that it does not sufficiently appear that the defendant owed any duty to the plaintiff which the defendant negligently failed to perform.

7. For that the averments set out, if true, do not show any liability on the part of the defendant herein.

8. For that the pleader sets out in what said alleged negligence consisted, and the facts so set out do not show negligence.

9. For that there does not appear sufficient causal connection between the defendant's said alleged breach of duty and plaintiff's injuries and damages."

9. The Court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being stated as follows:

"That it appears from the averments thereof that plaintiff's cause of action is based wholly upon a statute known as Section 2486 of the Code of Alabama of 1907, as amended, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law."

10. The Court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being stated as follows:

"For that it appears from the complaint and each count thereof that the plaintiff's cause of action is based wholly upon a statute known as Section 2486 of the Code of Alabama of 1907, as amended, which statute is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law."

11. The Court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being stated as follows:

[illegible] "For that said complaint and each count thereof, although claiming punitive damages alone, does not charge the defendant with any willful misconduct or with that entire want of care which would raise the presumption of a conscious indifference to the consequences."

12. The Court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being stated as follows:

"That it appears from the averments thereof that plaintiff's cause of action is based wholly upon a statute known as Section 5686 of the Code of Alabama of 1923, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law."

13. The Court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being stated as follows:

"For that it appears from the complaint and each count thereof that the plaintiff's cause of action is based wholly upon a statute known as Section 5696 of the Code of Alabama of 1923, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States for that it would deprive the defendant of its property without due process of law."

14. The Court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being stated as follows:

"For that it does not appear what duty, if any, the defendant owed to the plaintiff which defendant negligently failed to perform."

15. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that it was not negligence per se to operate an elevator of the kind upon which the plaintiff was killed without closing the inner doors."

16. The Court erred in refusing the following charge duly requested in writing by the defendant:

"13. I charge you, that under the complaint in this cause you cannot assess punitive damages against the defendant."

16. The Court erred in refusing the following charge duly requested in writing by the defendant:

"2. If you believe the evidence in this case you cannot find your verdict for the plaintiff."

[fol. 19] 17. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that the defendant is not an insurer of the safety of passengers lawfully upon its elevators, but is required only to use reasonable care under the circumstances to protect them from injury resulting from the operation of the elevator car."

18. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that under the complaint in this cause, in determining what you shall assess as damages, that you cannot assess punitive damages but are confined to compensatory damages, that is, such damages as may adequately compensate for the actual loss sustained to the plaintiff in this cause."

19. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that if you believe from the evidence that an ordinarily reasonable and prudent person would have operated an elevator under circumstances similar to those under which the plaintiff's intestate was killed, without closing the inner elevator doors, then you must find your verdict for the defendant."

20. The Court erred in refusing the following charge duly requested in writing by the defendant:

"If from the evidence you believe the the defendant's Agent or servant was operating the elevator car with that degree of care, prudence and skill which an ordinarily careful and prudent man would have done under similar circumstances you must find your verdict for the defendant."

21. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that unless you believe from the evidence that the defendant's operator was guilty of wantonness in and about the operation of the elevator at the time the plaintiff's intestate was killed, that you cannot find your verdict against the defendant."

22. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that it was not negligence as a matter of law for the defendant to operate the elevator under the circumstances as shown by the evidence without closing the inner doors."

[fol. 20] 23. The Court erred in refusing the following charge duly requested in writing by the defendant:

"If you believe the evidence in this case you must find your verdict for the defendant."

24. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that unless you believe from the evidence that the defendant itself was guilty of some negligence on the occasion complained of over and above the negligence of the elevator operator herself, that you must find your verdict for the defendant."

25. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that if you believe the evidence in this case you cannot award the plaintiff more than nominal damages."

26. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of wilful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff."

27. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of willful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff."

28. The Court erred in refusing the following charge duly requested in writing by the defendant:

"If you believe from the evidence that the elevator car was not crowded at the time that the plaintiff's intestate was killed, then it was not the duty of the defendant's agent or servant to operate the elevator car with the inside doors closed, unless an ordinarily prudent man under like circumstances would not have operated said car with the doors open."

29. The Court erred in refusing the following charge duly requested in writing by the defendant:

[fol. 21] "I charge you, that if you believe from the evidence that the defendant, prior to the accident in this cause, exercised the highest degree of care which a careful and prudent man could exercise in the selection of an operator to run the elevator on the occasion when the plaintiff's deceased was killed, and exercised the same degree of care in installing the elevator and elevator equipment and keeping the same in good condition and free from defects, that you must find your verdict for the defendant."

30. The Court erred in refusing the following charge duly requested in writing by the defendant;

"I charge you, that if you believe from the evidence in this case that the defendant exercised the highest degree of care in the selection of elevator equipment used on this occasion and employed competent and skillful engineers to install the same and thereafter competent and skillful experts to inspect said elevator equipment at regular and frequent intervals just prior to the accident to guard against any defects or faulty construction or faulty operation and such examination by said experts failed to find any defects or faults in construction or operation, your verdict must be for the defendant."

31. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that if you believe from the evidence in this case that the defendant used the highest degree of care known to mankind in the selection of a competent elevator operator to run its elevator on the occasion complained of, and used the highest degree of care known to man to provide safe elevators for the transportation of persons using said elevators, in their store, either as customers or by their invitation or request, you must find your verdict for the defendant."

32. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that if you believe from the evidence that the elevator on the occasion complained of was operated in an ordinarily careful and prudent manner, you must find your verdict for the defendant."

33. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that unless you believe from the evidence that some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of plaintiff's intestate or subse- [fol. 22] quently ratified the negligent act of the operator which contributed to the death of plaintiff's intestate you cannot find your verdict against the defendant."

34 The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that the failure to have the inner doors of the elevator closed at the time of the accident complained of cannot be considered as the proximate cause of the death of plaintiff's intestate."

35. The Court erred in refusing the following charge duly requested in writing by the defendant.

"I charge you, that if you believe from the evidence there was no sudden start or jerk which caused the plaintiff to fall to the floor of the elevator car then you must find for the defendant."

36. The Court erred in refusing the following charge duly requested in writing by the defendant.

"I charge you, that unless you believe from the evidence that some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of plaintiff's intestate, or subsequently ratified the negligent act of the operator which contributed to the death of plaintiff's intestate you cannot find your verdict against the defendant."

37. The Court erred in refusing the following charge duly requested in writing by the defendant:

"If you believe from the evidence that the plaintiff's intestate was thrown to the floor of the elevator car by a sudden jerk or start, and if you further believe from the evidence that said jerk or start was not due to any lack of due care on the part of the defendant itself you must find your verdict for defendant."

38. The Court erred in refusing the following charge duly requested in writing by the defendant:

"I charge you, that the defendant's only duty to persons using its elevator in its store, either as customers or by their invitation

or request, is to use all reasonable means and efforts to furnish good and well-constructed elevators and elevator equipment adapted to the purposes of its use, of good material and of the kind which is found to be safest when applied to use, and to keep said elevators and equipment in perfect repair and to use due and ordinary care in the selection of skillful and competent operators for operating said elevators; and if you find from the evidence in this case that the [fol. 23] defendant has performed these duties you must find your verdict for the defendant."

39. The Court erred in that portion of its oral charge to the jury to which exception was then and there duly taken by the defendant, which charge was as follows:

"Now, if you are reasonably satisfied from the evidence in this case that the plaintiff is entitled to recover, the measure of damages as laid down by the law is whatever amount you may in your sound discretion assess, not to exceed the amount claimed in the complaint."

40. The plaintiff's right of action was based upon the so-called "Homicide Act", said act being known as Section 2486 of the Code of 1907, and Section 5696 of the Code of 1923, which said act is unconstitutional and void as being contrary to the 14th Amendment of the Constitution of the United States.

41. The plaintiff's right of action was based upon the so-called "Homicide Act", being known as Section 2486 of the Code of 1907 and Section 5696 of the Code of 1923, which said act is void and unconstitutional under the 14th Amendment of the Constitution of the United States, in that, said act undertakes to impose punitive damages upon an employer or master who is free from blame and negligence for the torts committed by his employee.

42. Said judgment is void and contrary to natural justice because there was no evidence to show that the defendant was in any wise negligent or blameworthy in causing the death of the plaintiff's intestate.

43. Said judgment is contrary to law, in that, punitive damages were imposed upon this defendant, although there was no evidence tending to show that the defendant was in any wise guilty of negligence causing the death of the plaintiff's intestate.

44. The verdict of the jury was excessive.

J. P. Mudd, Attorney for Defendant.

IN CIRCUIT COURT OF JEFFERSON COUNTY

NOTICE OF MOTION FOR A NEW TRIAL—Filed Nov. 26, 1924

To Willis Yeldell, as administrator of the estate of Carrie Yeldell, deceased, or Ben Ray and Rhoderick Beddow, Esquires, attorney's of record for the plaintiff:

Please take notice that the foregoing motion will be heard in the above styled court before the Honorable John Denson, as Judge

thereof, on, to-wit: 6th day of December, 1924, at ten o'clock A. M.
[fol. 24] J. P. Mudd, Attorney for Defendant.

We hereby acknowledge service of a copy of the foregoing motion and notice and waive all other and further service thereof.
This 26th day of November, 1924.
Beddow & Ray, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRIES

On this the 25th day of November, 1924, came the parties by their attorneys, and this motion is presented to the Court, and upon motion,

It is ordered and adjudged by the court that this motion be and the same is hereby continued to December 6th, 1924, and execution suspended until motion heard.

On this the 6th day of December, 1924, came the parties by their attorneys and upon their motion,

It is ordered and adjudged by the court that this motion be and the same is hereby continued to December 13th, 1924

On this the 13th day of December, 1924, came the parties by their attorneys and upon their motion,

It is ordered and adjudged by the court that this motion be and the same is hereby continued to December 20th, 1924.

On this the 20th day of December, 1924, came the parties by their attorneys, and upon their motion,

It is ordered and adjudged by the court that this motion be and the same is hereby continued to January 10th, 1925.

On this the 10th day of January, 1925, came the parties by their attorneys, and upon their motion,

It is ordered and adjudged by the court that this motion be and the same is hereby continued to January 17th, 1925.

On this the 17th day of January, 1925, came the parties by their attorneys, and this motion is argued and submitted to the court, and the same having been fully considered and understood by the court,

It is ordered and adjudged by the court that this motion be and the same is hereby in all things overruled. (Defendant excepts).

[fol. 25] IN CIRCUIT COURT OF JEFFERSON COUNTY

Bill of Exceptions—Filed March 4, 1925

CAPTION

Be it recorded that on the trial of the above entitled cause in the Circuit Court of Alabama, in and for Jefferson County on the 30th day of November, 1924, before the Honorable John Denson as Judge, a jury was empanelled, and the following proceedings thereafter had, to-wit:

Direct examination.

Mr. Ray:

My name is Willis Yeldell. I live at Monterey, Butler County My wife's name was Carrie Yeldell. She made a trip to Birmingham some time in the early part of this year and was living with me in Butler County at the time. She left about the 20th of February of this year to come to Birmingham. I was not with her. My wife was about 60 years of age. I am 61 years of age. I am the plaintiff in this case and the administrator of the estate of the deceased. I have five children. Emma West, my child, was living in Birmingham at the time of her death. Emma West is here. After she left me on the 20th of Feb. of this year I saw her next on or about the 28th. She was at the embalming Department in Bessemer when I saw her and she was then dead. She was in perfectly good health so far as I know at the time she left home. She complained of no physical ailments.

Cross-examination.

Mr. Mudd:

I am about 61 years of age. There could be a possibility of me being mistaken in my age. I have no family records showing my age directly, but "going from the law of the county where I served in different places on the roads and so on, being proved up from that". I don't suppose I am as much as 65 or 70 years old. From that I am about 61. My wife was sixty years of age. I am positive she was not 68. My wife was born and raised in the same county I was—we kind of growed up there—she was about 60 years of age. Her hair was not as gray as mine. She was a medium size woman and weighed about 125 or 130. We lived in Butler County and I farmed. She did just general duties about the house—just family duties. I supported her as her husband. Three of my children live in Birmingham, one lives in the same county that I live in, and one is living in West Virginia. The one that lives in the county that I live in is a married woman—they are all married. I cannot answer directly how long the last one has been married—something

[fol. 26] like ten years. The youngest one has been married that long "something another like that".

I couldn't well answer the question, the girls are all being supported by their husbands. Some are here and some in other places. My wife did not contribute to their support at all—They were not dependent upon her for support.

I do not directly know my oldest child's age—she is somewhere about 37—she may or may not be older.

I don't exactly know the youngest child's age—somewhere in her twenties.

I know Dr. Erskine Donald—positively know him—he did not treat my wife at all. I know Dr. Van Spears in Greenville. He treated my wife something like about 12 years ago. To the question "Isn't it a fact that you knew your wife had heart trouble before her death" he answered "I don't know anything about it".

Direct examination.

Mr. Ray:

My name is Emma West. I live at Riley Station, near Bessemer. My father is Willis Yeldell, and my mother's name was Carrie Yeldell. I am 37 years old. My mother came to Birmingham to my home February 22nd. While she was here she came to the City of Birmingham on Feb. 25th, Monday. I did not come with her. Mattie Mills came with her. She left about—I'm not positive—but something like 9:30 *o*f perhaps 10 in the morning. She walked as far as the corner. She was not complaining. I next saw her at Pizitz—in the afternoon, something like 1 o'clock, I suppose, not knowing exactly. She was on the third or fourth floor, I'm not positive which. She was dead when I got there She was dead; and on a stretcher when I got there. I did not see how it happened, and know nothing about that. My mother was living in Butler County. My brother Conrad is the oldest child. I am not positive but to the best of my knowledge she was sixty years of age, or perhaps 62. I have been living in Birmingham 20 years the 17th of this last September.

Cross-examination.

By Mr. Mudd:

I came to town when I heard of my mother's death and went to Pizitz's store. I am the oldest girl—I have a brother older than I. I do not know exactly how much older. I am positive he is not 40 years old—something like 39—he lives at Accoville, W. Va.

My sister, Mary Lou Looper, and I came to the store just as soon as I heard of my mother's death.

[fol. 27] I did not have any conversation with people there concerning my mother's death. I did not talk to the Coroner there at the time I came in. I was in the same room with my sister all the while I was there. She did not talk to the Coroner. The only thing

the Coroner said, "he come to me and told me he was going to have to take my mother to the Hillman Hospital for an autopsy. I asked him could we go, and he said no." I did not talk to the Coroner at that time. I did not tell him that my mother was 68 years old—I am certain about that. My sister did not, "as I know of," talk to him in my presence—I did not hear her tell the Coroner my mother was 68 years old. We did not have time to tell him anything. They took her out a little while after we got there. To the question "You are married and living with your husband," answered "I am married, all right." My mother didn't support me. I did not say to the Coroner at the time I came there that my mother had been suffering with heart trouble, nor did Mary Lou say that in my presence.

Redirect examination.

Mr. Ray:

The Coroner was there when we got there—something like 1 o'clock. I don't know who else was around there—a good many white people I didn't know. I suppose they were people at the place. I saw one man in here this morning that was there, who said he was a lawyer. I went up to the Coroner and looked at her. The man who told me he was a lawyer in there was the only one that was up there. My mother did not support me. I do not know who was running the elevator at the time of the injury.

DR. G. S. GRAHAM

Direct examination.

Mr. Ray:

My initials are G. S. I am a practising physician, graduate of Dartmouth Medical College year 1905 and practising since that time and practising in Birmingham February 25th of this year. I did not go to Pizitz's store on February 25th. I examined the body of a colored woman said to have been killed in an elevator down there at the store. I was called in by Coroner Russum and saw the body at the Autopsy House as we call it, at the Hillman Hospital. On my report the date is Feb. 25, 1924.

I call the examination I made a post-mortem, autopsy or necropsy; three terms that I call to mind right away. On examination I found evidence of severe injuries. On the skin there was a little abrasion [fol. 28] below the cheek bone, and a good deal of discoloration of the right breast. This was on the outside of the right breast. Near that was the framework of the thorax. We found fractures of the ribs, very extensive, on both sides, front and back; also fractures of some of the vertebræ, three vertebræ, three lower dorsal vertebræ.

On this side, on the right side, the first rib which comes in here was separated from its attachment to the breastbone. The first,

second, third, fourth, fifth, sixth, seventh and eighth ribs were fractured in a line that ran down about, say, rather transversely across the front of the chest. The eighth rib will carry about to there, (pointing). I saw the fracture. On the other side there were fractures of the upper ribs. There was separations on the second and third ribs on this side from the attachment to the breastbone; and there were fractures of the fifth, sixth and seventh ribs along in here. There were three fractures along here of these ribs. In the back on the left side there was a fracture here at about that point there of the sixth rib. There was a fracture of the seventh rib just below that. The eighth rib was fractured a little further back, about here. The ninth rib was fractured at about the same place, and the tenth, eleventh and twelfth were broken off from the attachment here. On the right side there were fractures of the eighth about in here. The eighth, ninth, tenth, and eleventh ribs about like that, and then the dorsal vertebrae, the backbone here where the ribs were attached also had some pieces of bone broken off of it. By "broken off" I mean that the backbone, separate pieces of the backbone had little boney projections from the side where the ribs were attached, and those projections were broken off as the ribs were fractured. I made an incision into the body and opened it up, and found that the heart had been punctured by a broken rib at the bottom of the right, the largest chamber of the heart on the right side, right ventricle. That hole was big enough to allow your little finger. There was a tear of the surface of the heart. On the upper portion of the heart there was a tear of the surface that didn't go through, didn't open into the cavity.

With reference to the lung: there was some hemorrhage, some bleeding underneath the covering of the lung; some frothy blood in the main air passages. Scientifically, this indicates an injury, most likely. I mean the lung will bleed beneath the covering, just as the skin bleeds when you hit it, when it gets a direct blow. I believe there was some puncture of the lung also; not extensive. The heart [fol. 29] is closer to the front of the human body than the back. With reference to the lung being nearer the front than the back, there is a little bit more muscle covering around the heart, but relatively there is not much difference. I examined the kidneys and found no injury. There was a disease of the kidneys, but no acute injury. I found no bones broken, such as arms, neck or legs. I opened the skull and that was not fractured. I do not remember her weight. I do not attempt to estimate the weight of a body because I am such a poor guesser. She was 165 centimeters long, and she was said to be well developed and nourished. That is equivalent to something like five feet and four or five inches. She was well developed and well nourished. When I say "well developed" I mean that she had considerable flesh; didn't look like she had been starved.

With reference to blood vessels (arteries and veins) being broken: coming up from the lower part of the body is a vessel known as the vena cava, which carries the blood from the lower part of the body and dumps it over into the heart. That was broken away from the heart where it joins the heart wall; completely separated. I noted

no larger vessels. If the particular vessel we are discussing should be broken it would cause instant death. The liver was considerably torn, and pieces of it were present up in the cavity of the lung—displaced. There was a slight tearing of the spleen also. The aorta is not the vessel I have already described. It is the principal vessel that carries the blood away from the heart to supply the rest of the body. In the aorta there were three transverse tears of the inner coats. That was at a level overlying the place where the backbone itself was injured, and probably was the result of the same injury.

Cross-examination.

Mr. Mudd:

In my opinion the injuries disclosed by my examination were sufficient to produce instant death, and my conclusion was that it did. As I remember this woman, she was of medium build and development. I remember that her breast development was rather prominent. Also to whether she could be termed a fleshy woman—as I say my memory on that is rather vague. I called her well developed and well nourished. I do not remember her age. She was old rather than young, but I don't remember closer than that. The kidneys showed some evidence of chronic disease and were a little smaller than normal. The disease that she had is known commonly as chronic Bright's disease. It is a little hard for me to state in a [fol. 30] few words the effect of Bright's disease. It manifests itself in a disturbance of the general health. That means—well, the symptoms of chronic nephritis are headache, various nervous symptoms, usually an increase in blood pressure, urinary changes; the principal changes really are found on examination of the urine, increased amount, more specific gravity, the presence of various abnormal things in the urine. In general it produces other manifestations in the patient—has a tendency to lower their vitality. It affects all the body, because it interferes really with the body getting rid of waste substances, and so on. Answering the question "Does it ever produce nausea, dizziness or vertigo," "It may." It can produce that. Chronic Bright's disease produces headache at times. That is one of the symptoms of the disease. I could not tell by an examination of these kidneys how long that had been running on. A kidney disease of that sort is a matter sometimes of month, months and years. Indirectly it produces death—by allowing the body to become what you might call poisoned, because the waste substances are not thrown off from it.

It might take a good many years for chronic Bright's disease to produce death in a person 60 years old. It commonly does. This disease is one that commonly begins, or is apt to begin somewhere in middle life. By middle life I mean 40 years. And that produces more or less disturbance that ordinarily doesn't amount to much for a period of maybe 10 or 20 years, and then becomes more evident; doesn't need definite inference. Eventually if it goes so far it produces death from failure to eliminate the poison from the body. From the description I have on those kidneys the disease was

relatively early. In a wholly developed disease we get more contraction of the kidneys than we have here. Yes, it makes Bright's disease to get uric acid in the blood. As to effect of uric acid in the blood—it is just a question of how much uric acid is in the blood. Uric acid is an indicator of poisons, and perhaps a danger in itself. The presence of that whole disturbance that is evidence of uric acid is most commonly brought out in rheumatic pains, or in extreme cases, gout. I know of no consequences if the blood should carry uric acid to the brain. I don't know that this would produce death. I have no opinion on that.

Redirect examination.

Mr. Ray:

Kidney disease is common in middle life—it grows along with [fol. 31] age. I don't know that I made *the* just the statement "that in the condition that I found here, I saw nothing that would authorize the conclusion that the patient, from that cause alone, wouldn't live for many years," but I think that is true. I would say that. From looking at those kidneys, if that was the controlling disease that she had, I would say that she could have lived a number of years. The word "syncope" means fainting, temporary loss of conscience. In my original report, that reference to syncope, or death preceding injury, meant that I could find no positive indication of anything that would cause a syncope or loss of consciousness. I had that thing in mind particularly in my examination of the heart of this woman. I found no evidence to indicate syncope, or death just preceding the injury.

Recross-examination.

Mr. Mudd:

To the question "There may have been conditions, however, that would produce that particular result without your necessarily finding it, might there not,"—answered "My position on that thing was taken on negative rather than on positive ground. It had to be, I mean I didn't find heart lesions that I could recognize, and therefore—(interrupted by question). Fainting spell or dizziness is one of the symptoms of chronic kidney trouble. I don't know whether it was in this case or not. It would be possible to produce that from this chronic kidney disease. To the question "If she had had a fainting spell due to diseased kidneys, which I understand you to say is possible, would that have revealed itself in the examination that you made," answered, "so far as fainting spells go, it is difficult for me to express my feeling on that thing. With this amount of kidney disturbance, provided it would take a clinical examination of the patient with these kidneys to determine how much disturbance she was actually suffering from this diseased kidney, ordinarily I would say that with this disease of the kidney the patient might be

getting along without symptoms. However, some people are more susceptible than others to a disease of this sort, and it might be possible—I can't say it would be impossible—for her to have symptoms from this diseased kidney.

Yes, in general it would be true that it would manifest itself more decidedly and more clearly in an elderly woman than it would in a young person. I do not believe that the general vitality of a woman [fol. 32] who is about 60 years of age and had had five children would be affected more readily and more extensively by a chronic disease of the kidneys than a person who had never borne children. The bearing of children produces a temporary kidney disturbance. That is ordinarily recovered from right away, however. It produces a kidney disease of a different type than we are talking about. I made examination for that type of kidney disease, and saw evidence of that. I could not put my finger on any particular cause of the particular kidney disease she had; nobody knows what the cause of it is. In general the best conclusion is that it is improper elimination of po-son from the system, but exactly what the thing is that is causing the trouble they are still trying to find.

Redirect examination.

Mr. Ray:

Yes, I said that there wasn't any such thing that I knew of as uric acid going to the brain. I did not know what was meant by the question "Suppose the blood carries uric acid to the brain, what would be one of the consequences of that." Uric acid in the blood of course goes everywhere in the body. If it comes out of the blood at all, it is deposited in the tissues somewhere. I found an acute injury of the heart; that is all. Yes; I found cuts. I couldn't find anything wrong so far as the general mechanism of the heart.

Mattie Mills

Direct examination.

Mr. Ray:

My name is Mattie Mills: I live at Riley Station. I didn't know Willis Yeldell until he come up here the day his wife got killed. I knew Carrie Yeldell by being with her that day she was killed. I met her that Friday, the Friday night before she got killed on Monday. I came with her—caught the car at Riley Station. She lived up in Riley, out on the Bessemer carline. We left home before noon, no one else with us, and got off on Second Ave. and 20th St. and went in the First Nat'l Bank, from there down to Woolworths, then to Kress' and then on down the street and went on across to Mr. Pizitz's store into the old building. We had gone to get her a hat. We had a conversation about the hat before we went across there. I

did not talk to anyone at Pizitz's store no more than the elevator man. We did not get a hat in the old building. He put us off. I told him I wanted to go to the place to get a hat. I knew where I had been [fol. 33] going. We went to the Fourth Floor in the new building to get a hat. She was with me when this conversation was going on; standing right there with me and went with me to the new building. We were on the third floor and got on the elevator there. I never paid any attention to the number of the elevator at all. A brown skinned girl operated the elevator—a colored woman. I did not know her name. Some people were in the elevator—I don't know how many—have no idea. I went in first and she followed me. When I went in she stepped in right behind me, and I turned my face to the door where we entered in, and just as she could turn her face to the door, before she could steady herself after she turned, the elevator rushed right off, and that give her a sudden jerk, and that just threw her down. The elevator door wasn't shut. The door to the elevator—the door to the building was shut, but the elevator door wasn't shut. It went off before it was shut. She was pitched like that (indicating). Her body went down to right along here (indicating). She said nothing—didn't have a chance to say anything. She groaned after she was snatched through there. I got her out. After she got to the door where it caught—just like if anything was in that window facing, it couldn't go up. When she got there, it clogged her; it couldn't go any further. I says, "You have killed this woman; stop." So a young man that was standing behind the elevator girl—she had done fell out. No sooner than she saw—No sooner than she saw she was gone down, she just throwed up her hands and screamed and went back. She turned the wheel loose. I couldn't tell how many were in the elevator because I didn't notice. One man was standing right behind the elevator girl, and he was the one that carried the elevator back so we could get her out. She caught between the third and fourth floors. I ought to have ridden in elevators before—I've been in Birmingham ever since *1819*. When the elevator started off it went just as quick as it could—it seemed to me it was gone. I had not heard her during the morning complain of feeling ill or of any discomfort.

Cross-examination.

Mr. Mudd:

I am sure I got on the elevator on the third floor. I ought to be familiar with Pizitz's store—I've been trading there since 1901. Haven't been there so regular since the new building. I don't know one floor from another. I know I was on the third floor. I wouldn't know what you were talking about when you say mezzanine floor unless you show me. I reckon it was the third stop from the bottom. [fol. 34] They told me that was the third floor, and I believe it, because I didn't have but one story more to go.

Mr. Mudd: I move that that testimony be excluded, because she is basing it upon what somebody told her, and shows that she doesn't

know of her own knowledge what floor it was; and I move to exclude it on the ground it is immaterial, irrelevant and incompetent.

The Court: Overruled.

Mr. Mudd: We except.

It was the third floor I got on. Well, really it was the third floor, because we come up one story on the elevator, and we got off and walked to the next floor. Got on the first floor and rode to the second, and then we went around some steps to the third floor. Where I got on there were no more steps below me unless it was the basement. I haven't been in no basement in Pizitz's store. The floor where I got on first was level with the sidewalk, because I went right on to the front door and went to the back where I had been catching the elevator and caught. Went in level with the sidewalk, got in the elevator and went up one floor and then walked to the next. Yes sir that was the second stop of the elevator from I first took it originally. Went up one floor and walked another flight. I rode one story and walked up another. So when I got to that other place where I walked that was the third floor. I didn't go where the elevator had stopped the second time. I got on the elevator on a level with the street and I went up one stop. Then I went around the steps to another room across just like coming in that door, and got on the elevator. I went in the elevator and Carrie Yeldell came in right after. She closed the outer doors after we got in. That is really true. I just walked right on in Just like this is the door. I walked right on in. Then when I got in, I would have to turn. Then she stepped right in behind me, and when she went around like this, just as she got this way, the elevator went off, and that pitched her like that. (Indicating.) I stood nearly to the back, and she come right in and stopped right by me, and that made her right to the side of me, on the right side, near the back of the car. I am positive about that. I didn't go quite to the back of the car—over half way to the back—yes sir, nearer the back than the front. Just as the car started off, I had done turned, and she had done made her turn, but hadn't steadied herself, and it was just gone like that. I noticed her when she done [fol. 35] fell. When I noticed her she was gone. Yes sir, she was falling over them.

Q. Where was Carrie Yeldell when the operator first saw her?

I first took the elevator in the old building and went up one flight and then walked a flight and crossed to the new building. The elevator did not stop after Carrie Yeldell fell until her body hung it up. That was at the top of the door and was between the third and fourth floors.

From the time I got on the elevator until it stopped it hadn't got quite to the top of the door. I mean where the body had fell in. The elevator operator let go of the handle when she hit the top of the door. You know it is just like she would fall on the floor and drop. The elevator stopped when it got to the top. The operator let go of the handle no sooner than she saw the woman had dropped through. The elevator was standing still. The bottom had hit the top of the—the bottom of it where she was, you know, dropped down.

The elevator was going to the fourth floor, and it hadn't gone nowhere hardly. I don't know how far it had gone. I might tell you it was two and a half and it might have been three feet. It hadn't gone very far when she let go of the handle. The car was clogged—it couldn't go any further. I have no idea of the distance between the third and fourth floors. I don't know whether it went any further after she let go of the handle. I know it was clogged and couldn't go, if it had wanted to.

I helped pull the woman's body out where it was wedged between the floor and the outer wall—it hadn't fallen through. Somebody helped me. The young man who stood behind the elevator girl dropped the elevator back to the third floor where we got on. We took her and carried her in the back part. No sir, not to the back part of the elevator. The body was removed at that point. I know it. Yes sir it is a fact that that body was taken out and the elevator carried up to the next floor above. We taken the body out; then the elevator went on to the fourth floor, I reckon. No sir, the body was not taken out at the fourth floor; it was the third floor. The elevator was dropped back to the third floor, to where we got on.

Plaintiff rested

MRS. SWINEY

Direct examination.

Mr. Mudd:

[fol. 36] I work for the defendant now—and also last February. I was on the elevator at the time the accident occurred and recollect it. I am familiar with the construction of the old and new building there—I have worked in both buildings. The height between floors in the new building is a greater. If a person should take the elevator on the ground floor of the old building, and go up one stop to the next floor, and then go to the new building and walk up a flight of stairs, he would be on the second floor.

The elevator was between the second and third floors when this woman fell. The operator released the car when the woman fell.

Q. She released the lever?

(Objection; leading.)

A. Yes sir; She just turned it loose—the lever—and the car stopped.

Q. Is that car so equipped that it stops on release of the lever?

Mr. Beddow: We object; calls for a conclusion, immaterial, irrelevant and incompetent testimony, and calls for the conclusion of a non-expert.

The Court: I sustain the objection.

Defendant excepted.

The car stops automatically after the lever is released. It does that every time.

Mr. Ray: That is a conclusion of the witness, and we object to it.

The Court: I'll sustain the motion. What she says the car does every time the lever is released, I'll sustain the objection to that. Deft. excepts.

So far as I know it stopped that way on this occasion. Dave Eisenberg took hold of the car and brought it back on up to the third floor. Yes sir; the next floor above. Yes sir, the third floor, and the body was taken out at the third floor. She was closer to the front part of the elevator at the time she began to fall. The elevator starts off slowly and gradually gets faster—picks up speed. There was no jerk at that time. I have ridden that elevator a number of times.

Q. Did you ever notice any jerk or sudden start in that elevator?

Mr. Beddow: We object to that.

The Court: Sustained. Defendant excepts.

[fol. 37] Cross-examination.

Mr. Beddow:

My name is Mary Swiney and I have been at Pizitz over eleven years and worked for him in the capacity of Assistant Manager. The accident occurred about twelve o'clock. I had been down on the balcony. The mezzanine floor is a lunch room, and is between the first and second floors. It is just about as far from the bottom floor to the mezzanine as from the second to the third floor, I suppose. Yes sir, the distances are equal between the first and mezzanine, and the mezzanine and second, and the second and third. I caught the elevator at the balcony in the new building. The ceilings are higher in the new building. There is a passage-way from the old building to the new on the second floor,—yes sir, and there is a stair way on the second and third but not on the fourth floor. There are three stories in the old building. The negro got in the elevator after I did on the second floor. If you figure that the mezzanine is the second floor that would be the third floor. Yes, the elevator stops at the mezzanine floor, and the second and third, and on up. I don't know the kind of elevator—it is new. It starts slow but it gradually gains speed. I don't really know that it is a very rapid elevator. I should judge the length and width of that elevator eight ft.; and is greatest length in depth. No, it is not a narrow elevator,—it is about seven feet wide I guess. It was six or seven feet from the entrance to the back of the elevator. The woman was more over in the corner of the elevator than about midway; about two feet from the back of the elevator. I was standing right at the back, right in the center. The woman who was injured was standing next to me—about two feet from me on my right, and the other woman was standing out in front of us just a little. Dave Eisenberg was in the far corner from me. The elevator had steel doors and

also door to the shaft that it was operated in. The elevator operator made no attempt to close the steel door. I did not know the operator of the elevator—I knew her when I saw her. I do not know how long she had operated that elevator, not exactly; several months. I am not positive she had been operating that elevator seven months. Yes, I know she had been working for Pizitz for over thirty days. I do not know whether she is here today—I have not seen her to-day. Yes sir, I saw her at the time she fell. I was not talking to Eisenberg, and had not said a word to him, nor had he talked to me. Two colored passengers were in the elevator at that time,—two colored women and myself and Eisenberg, and the driver. Yes [fol. 38] sir, that is all. Mrs. Bradley who had been sitting in the hall with me that morning was not in the elevator.

Recross-examination.

By Mr. Beddow:

This elevator is about seven feet wide, and about five feet deep. The negro woman that got injured and killed was kind of catercornered from me; not straight in front of me. I stated that she was about three or three and one-half feet from me, and about 3 or 3½ feet from the door, and there was a steel door there. I stated that is she was standing in front of me, and about the middle of the elevator, she would have been standing about 3½ feet from the door.

Mr. J. W. Tipton

Direct examination.

By Mr. Mudd:

I am an officer of the defendant company. I have general charge of the office and employes connected with the office, and at times general supervision around the place, and was acting in the same capacity at the time of this accident complained of in this suit. The name of the operator who was operating this elevator at the time of the accident was Etta May Watkins. She had been with us, I would say, six or seven months, and had been running elevators for us during that time.

Q. Did you regard her as a competent and skilled elevator girl?

Mr Meddow: We object to that; calls for immaterial, irrelevant and incompetent testimony; invades the province of the jury, and calls for a conclusion of the witness.

The Court: I sustain the objection.

Mr. Mudd: We except.

Q. State how and what method was used of selecting operators to run that car.

Mr. Ray: We object; calls for immaterial, irrelevant and incompetent testimony; not a part of the res gestæ, and sheds no light on the issues here.

The Court: I sustain the objection.

Mr. Mudd: Then we reserve an exception, and——

The Court: Here is the theory on which I sustain the objection: You say what was his system. He might not have carried out that system.

[fol. 39] Mr. Mudd: We except to that further ruling.

Q. What safeguards or what care did you use in selecting this particular operator to run your elevator?

Mr. Ray: We object to that on the same grounds assigned to the other question.

The Court: Overruled.

Mr. Mudd: We except.

A. This particular operator was employed in the same manner as everybody else in the store. I don't employ the people.

Mr. Beddow: We move to exclude that on the same ground.

The Court: I sustain the motion.

Mr. Mudd: We except.

Q. Do you know of your own knowledge what care is exercised in the employing of operators of these cars?

Mr. Beddow: We object to that on the ground it calls for immaterial, irrelevant and incompetent testimony.

The Court: I sustain the objection.

Mr. Mudd: We except.

Q. I'll ask you if this elevator girl was a girl of knowledge and ordinary intelligence.

Mr. Ray: Just a minute. We object to that on the ground it calls for immaterial, irrelevant and incompetent testimony; invades the province of the jury, and calls for a conclusion not warranted by any evidence in the case

The Court: Overruled.

Mr. Ray: We except.

A. To the best of my knowledge and belief, she was above the average in intelligence for that kind of person.

Q. Did you regard her as a good operator?

Mr. Ray: Wait a minute. We move to exclude that answer on the same grounds.

The Court: Overruled.

Q. You say you regarded her as a good operator?

A. Yes, sir.

Q. Mr. Tipton, as manager of the store, did you have anything

to do with the selection of these particular elevators there, of which this was one?

A. We have a committee that we call the managing board, of which I am chairman, and they brought up a round table discussion.

Q. You participated in that?

[fol. 40] A. Yes, sir.

Q. What kind of elevator is this?

A. It's an Otis.

Q. Did you endeavor to select the best elevator possible for the particular use to which you wished to put it.

A. We did.

Mr. Beddow: We object, and move to strike the answer. I held up my finger so the gentlemen would know I was going to object.

The Court: I sustain the objection.

Mr. Mudd: We except.

Mr. Beddow: Will your Honor instruct the jury not to consider that answer?

The Court: You needn't consider that answer, gentlemen.

Mr. Mudd: We except to your Honor's ruling.

Mr. Beddow: In order that we may have the record straight, if your Honor please, I would like to state that our reason——

The Court: I have ruled with you; you needn't give any reason.

Mr. Beddow: I just thought maybe there would be some point raised later that you sustained it without our assigning our reasons for the objection. I just wanted to keep the court in the clear; that's all.

Q. Was that in your opinion the best elevator you could buy?

Mr. Beddow: We object; calls for immaterial, irrelevant, illegal and incompetent testimony; testimony not hypothecated upon any experience of the witness; not shown he is an expert.

The Court: I sustain the objection.

Mr. Mudd: We except.

Q. Mr. Tipton, you ride these elevators all the time, do you not?

A. Yes, sir.

Q. Have you ever known them to start off with a sudden jerk?

Mr. Ray: We object to that on the same ground.

The Court: Sustained.

Mr. Mudd: We except, your Honor.

This elevator was so equipped mechanically that by the release of the lever while running it will operate automatically to stop it. These elevators as compared to the elevator of an office building run slowly. These elevators start off very slowly, barely perceptible, and then they pick up speed as they go along.

Cross-examination.

By Mr. Beddow:

I was not in the elevator at the time of the accident. It is a pas- [fol. 41] senger elevator used by people that are trading with Pizitz, and it is for their convenience and comfort to go upstairs, and is used by the public in general. I am not an elevator man, and have never repaired elevators or built them or installed them, and am not an expert on elevators. The dimensions of the elevator, I should say, are about eight feet in depth and about nine feet. To the best of my belief that elevator was more than five feet deep. They are very little bit wider than they are deep. In their store there are eight elevators including the freight elevators. There are nine in all the building. There are five in the new building, four of which are passenger elevators. I don't know the name of the woman that was driving the elevator just to the left of the one Etta May Watkins was driving. I don't know whether she is still there or not. I will have to refer to the records to tell you that. I can not say how long the operator that was working to the left of the one where the woman was killed had been working for us. I know how long this girl had been working for me. I have referred to my records on several occasions, and referred to the record of Etta May Watkins several days ago. I do not recall what was the occasion for my doing so. I know how long that woman had been there. She worked at Steele-Smith's before she came to my building. I know the names of the other women driving elevators down there. They are sometimes driven by women, and sometimes driven by men. We have relief operators. We have men driving at times, and women driving at times. We have one girl there names Alberta Swanson. She has been there several months. I do not know where she worked before she came to my employ. The new building was opened in October, 1923, and the accident happened in Feb. 1924.

Redirect examination.

By Mr. Mudd:

That girl had been operating one of the elevators on the old building, and moved over to the new building. She was there some time prior to the opening of the new building. The body of Carrie Yeldell was taken off at the third floor. I saw her after she had been taken off.

M. M. Ullman

Direct examination.

By Mr. Mudd:

Q. Mr. Ullman, I want to ask you if you can identify this woman here? (Referring to Mamie West.)

A. I think she is the woman I saw down at the Louis Pizitz store at the time of the accident to Carrie Yeldell, when Carrie Yeldell was killed. This woman came in later. My recollection is this woman said she was Carrie Yeldell's daughter, and she said something with [fol. 42] reference to whether or not Carrie Yeldell had heart trouble at that time. She said she had begged her not to leave home that morning; that she wasn't well, and had a shortness of breath when she left home.

Mr. Beddow: Wait a minute. We are going to object to that on the ground that no predicate has been laid for that, and it calls for immaterial, irrelevant, illegal and incompetent testimony.

The Court: Overruled.

Mr. Beddow: We except.

A. (Cont'd). She said, furthermore, that she had been suffering from heart trouble for a number of years, and I asked her if she had ever had a physician to wait on her for heart trouble, and she said yes. I asked her who the physician was, and she gave me the names of two or three physicians that had waited on her for that trouble and had treated her.

Cross-examination.

By Mr Beddow:

My name is Major Ullman. I am a practicing attorney in the city of Birmingham, and have been so for thirty years. I am sometimes counsel for the Pizitz Dry Goods Co. I am his regularly employed attorney, and was at that time. I got there immediately after the accident. I should say I got there around 1:30 or 1:45. I went to the place where these colored people were, but this woman that is here wasn't there when I got there. I made a memorandum of what either of these parties said. I wrote down the names of these colored people, and turned the memorandum over to Miss Bradley. I haven't the memorandum now, and do not know where it is. I have not refreshed my recollection from the memorandum lately. When I was talking to this party, it was in a little room cut off from one end of the store in the southwest corner of the store, which was a stock-room, and in that room there was a table or counter and several chairs. The woman was brought to this room, and laid upon the table while the coroner conducted an investigation. I never knew David Eisenberg before that time. I saw him there. I was present at the time the coroner examined the witnesses with reference to this matter, and helped to examine them. Miss Bradley had called me up, and asked me to come there. I was not representing the State of Alabama, but was representing Louis Pizitz Dry Goods Company. The dead woman had no counsel. I was informed there was present a negro woman who was on the elevator at the same time the accident happened. Etta May Watkins, the operator of the [fol. 43] elevator, was present part of the time when the witnesses were examined before the coroner. She was requested to tell how

the accident happened. I was not present in the coroner's office, and never went to the Coroner's office. I never saw any interrogatories, and never saw her answers, and I don't know whether there was any interrogatories filed. I have had nothing to do with the case from the day the thing happened up until this time. My recollection is I questioned the elevator girl, a young white boy that was on the car, a negro woman that was on the car with her at the time of the accident, and her daughter when she came up there. There were two women that came with her daughter. I could not tell their names. I talked to this woman that stood here in your presence a minute ago. It is my best recollection that I talked to her. I never saw the woman but once in my life until that afternoon, and I made no effort to charge my memory with her appearance; but that is my recollection and judgment about it—the woman who came in response to a telephone conversation.

J. D. CLEM

Direct examination.

By Mr. Mudd:

My name is J. D. Clem. My business is that of Superintendent of Otis Elevator Company, and I have been with the Otis Elevator Company about fifteen years. I have been Superintendent here for about five years. My duties as Superintendent are to supervise the erection and repairs to elevators, and the inspection of elevators. We installed the passenger elevators in the new Pizitz building. They are modern in design and construction, and safe in design and construction. The rate of speed of this elevator is 350 feet per minute. The average rate of speed of Department store elevators is from 300 to 400 feet. The fastest rate of speed of office building elevators that I know of is, I believe, 900 feet a minute. The elevator in question was 350 feet. This elevator, I should judge, starts off at from 100 to 150 feet a minute. They start off slowly, and then pick up speed. I recall the occasion when a woman was alleged to have been killed in an elevator or on an elevator down there in Pizitz' store, and know the elevator in question. Considering the equipment that that elevator had at that time, and considering the mechanical devices for that elevator, it was not possible for that elevator to start off at a rapid rate of speed. It was not possible for that elevator at that particular time to start off without there being some contact with the power.

[fol. 44] There is a contact on the gates that prevents the car from starting until it is closed. Before the elevator actually starts, the outer gate has to be closed fully, and then the operator puts her lever down, and the car starts immediately after she puts her lever down. That operation would possibly take two seconds. The elevator starts off after the outer door is closed, and this starting switch

is put in the up direction or down direction, whichever the case may be, until the car attains full speed, which is approximately four or five seconds. With reference to the installation on that elevator of equipment or devices for stopping the elevator, I would say the starting switch when that is brought to the center, or whenever you take your hand off of that switch, it instantly comes to the center, and the car stops immediately. If the operator releases the lever, the car automatically stops. The release of the lever operates to cut off the electricity or power, and apply the brakes.

Cross-examination.

By Mr. Beddow:

My business is that of Superintendent of the Otis Elevator Company, and I have been working for the Otis Elevator Company about fifteen years. I have worked in Birmingham, Mobile, Nashville and Atlanta. My duties are to superintend the erection of and repairs to elevators. I do not install them. I am an elevator mechanic. I did not install the elevators of Louis Pizitz Dry Goods Company. I was present when they were installed. Louis Pizitz has six elevators in the new building. I had possibly examined the elevator on which the plaintiff's intestate was killed the day before. I couldn't say that I had examined it the day before, or the day before that, or the day before that. I had examined it within thirty days. I probably examined it between the 20th and 25th of February. I have known the mechanism of these elevators to get out of order. It is possible. I couldn't recall when I last examined that particular elevator before the accident. There is about an inch and a half between the elevator shaft and the elevator. Electric hoisting machinery lifts the elevator. This machinery is directly over the shaft. It consists of motor winding drum, gear and brake. The lever works automatic switches on the controller.

Q. If a woman weighing about 160 pounds, of about medium stature, were on an elevator of the kind and character that you have testified to, and her body was caught between the elevator and that [fol. 45] inch and a half space between the shaft and the elevator, and her shoulders and head up to here went down into that elevator shaft, isn't it a fact, and don't you specifically know that that elevator would have to be running at a very rapid rate of speed.

A. No, sir.

I say a woman weighing 160 pounds could not go down an elevator shaft where she had only an inch and a half clearance. I did not see that woman pulled out of the shaft. I do not know whether they had to let her body back down to where they could open the door, and take it out. I should judge there are three and one half to five inches between the outside stationary door, that is, the outside door to the shaft, and the metal door that closes between the shaft and the elevator. There is a metal door on these elevators. They are not put there for ornamental purposes, but are put there to protect passengers, and when they are closed, it does protect passengers from the shaft.

Redirect examination.

By Mr. Mudd:

It was my custom and habit prior to the time of the accident, to inspect these elevators every week, and I had done so. They are of approved and modern construction.

This was all the evidence in the case.

ARGUMENT OF COUNSEL

After the evidence was all in, the counsel made their respective arguments before the jury. Mr. Mudd, counsel for the defense, during the course of his argument to the jury, used the following words and language in effect: "The evidence shows that the deceased was a countrywoman, from Butler County, Alabama. Doubtless she was unaccustomed to the use of elevators; possibly she became dizzy or nauseated from the sensation of riding in an elevator, and this caused her to faint and fall to the floor." During the course of the plaintiff's closing argument to the jury, the plaintiff's counsel used the following words and language in effect:

"Defendant caters to the country people, and invites them there to trade, Country people and people of all classes would come there to trade, and he advertised goods for country people, and also to be sold to everybody." The defendant's counsel then and there objected to the aforesaid remarks of plaintiff's counsel on the groun i that there was no evidence in the case of such facts, and such statements were prejudicial and harmful in their nature. Thereupon, [fols. 46 & 47] the following colloquy took place:

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Beddow: "I'll ask your Honor to instruct the jury not to consider anything I said about country people trading there, or about advertising the business.

The Court: Gentlemen of the jury, you are instructed that you are not to consider anything said by Mr. Beddow in this argument about country people trading there, and the defendant advertising for country people to come and trade there. That should be excluded from your consideration, and you will not consider that at all, in arriving at your verdict."

Defendant excepts.

Upon conclusion of the evidence and arguments by counsel, the Court gave the following oral charge:

CHARGE TO JURY—Omitted; printed side page 8 ante

[fol. 48] DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY REFUSED

And immediately after the giving of the oral charge by the court, the defendant in open court, in the presence of the jury, and before its retirement, duly requested in writing the following written [fol. 49] charges, separately and severally, each of which the court refused to give, endorsing thereon in each instance, "Refused, Denson, Judge."

The requested written charges were as follows:

15. "I charge you that it was not negligence per se to operate an elevator of the kind upon which the plaintiff was killed without closing the inner doors.

16. I charge you that under the complaint in this cause you can not assess punitive damages against the defendant.

16-A. If you believe the evidence in this case you cannot find your verdict for the plaintiff.

17. I charge you that the defendant is not an insurer of the safety of passengers lawfully upon its elevators, but is required only to use reasonable care under the circumstances to protect them from injury resulting from the operation of the elevator car.

18. I charge you that under the complaint in this cause, in determining what you shall assess as damages, that you cannot assess punitive damages but are confined to compensatory damages, that is, such damages as may adequately compensate for the actual loss sustained to the plaintiff in this cause.

19. I charge you that if you believe from the evidence that an ordinarily reasonable and prudent person would have operated an elevator under circumstances similar to those under which the plaintiff's intestate was killed, without closing the inner elevator doors, then you must find your verdict for the defendant.

20. If from the evidence you believe that the defendant's agent or servant was operating the elevator car with that degree of care, prudence and skill which an ordinarily careful and prudent man would have done under similar circumstances you must find your verdict for the defendant.

21. I charge you that unless you believe from the evidence that the defendant's operator was guilty of wantonness in and about the operation of the elevator at the time the plaintiff's intestate was killed, that you cannot find your verdict against the defendant.

22. I charge you that it was not negligence as a matter of law for the defendant to operate the elevator under the circumstances as shown by the evidence without closing the inner doors.

23. If you believe the evidence in this case you must find your verdict for the defendant.

[fol. 50] 24. I charge you that unless you believe from the evidence that the defendant itself was guilty of some negligence on the occasion complained of over and above the negligence of the elevator operator herself, that you must find your verdict for the defendant.

25. I charge you that if you believe the evidence in this case you cannot award the plaintiff more than nominal damages.

26. I charge you that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of willful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff.

27. I charge you that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of wilful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff.

28. If you believe from the evidence that the elevator car was not crowded at the time that the plaintiff's intestate was killed, then it was not the duty of the defendant's agent or servant to operate the elevator car with the inside doors closed, unless an ordinarily prudent man under like circumstances would not have operated said car with the doors open.

29. I charge you that if you believe from the evidence that the defendant, prior to the accident in this cause, exercised the highest degree of care which a careful and prudent man could exercise in the selection of an operator to run the elevator on the occasion when the plaintiff's deceased was killed, and exercised the same degree of care in installing the elevator and elevator equipment and keeping the same in good condition and free from defects, that you must find your verdict for the defendant.

30. I charge you that if you believe from the evidence in this case that the defendant exercised the highest degree of care in the selection of elevator equipment used on this occasion and employed competent and skillful engineers to install the same and thereafter competent and skillful experts to inspect said elevator equipment at regular and frequent intervals just prior to the accident to guard against any defects or faulty construction or faulty operation and such examination by said experts failed to find any defects or faults in construction or operation, your verdict must be for the defend-
[fol. 51] ant.

31. I charge you that if you believe from the evidence in this case that the defendant used the highest degree of care known to mankind in the selection of a competent elevator operator to run its elevator on the occasion complained of and used the highest degree of care know- to man to provide safe elevators for the transportation of persons using said elevators, in their store, either as customers or by their invitation or request, you must find your verdict for the defendant.

32. I charge you that if you believe from the evidence that the elevator on the occasion complained of was operated in an ordinarily careful and prudent manner, you must find your verdict for the defendant.

33. I charge you that unless you believe from the evidence that

some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of plaintiff's intestate, or subsequently ratified the negligent act of the operator which contributed to the death of plaintiff's intestate you cannot find your verdict against the defendant.

34. I charge you that the failure to have inner doors of the elevator closed at the time of the accident complained of cannot be considered as the proximate cause of the death of plaintiff's intestate.

35. I charge you that if you believe from the evidence that there was no sudden start or jerk which caused the plaintiff to fall to the floor of the elevator car then you must find for the defendant.

36. I charge you that unles you believe from the evidence that some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of plaintiff's intestate, or subsequently ratified the negligent act of the operator which contributed to the death of plaintiff's intestate you cannot find your verdict against the defendant.

37. If you believe from the evidence that the plaintiff's intestate was thrown to the floor of the elevator car by a sudden jerk or start, and if you further believe from the evidence that said jerk or start was not due to any lack of due care on the part of the defendant itself you must find your verdict for defendant.

38. I charge you that the defendant's only duty to persons using its elevators in its store, either as customers or by their invitation or request, is to use all reasonable means and efforts to furnish [fols. 52-59] good and well-constructed elevators and elevator equipment adapted to the purposes of its use, of good material and of the kind which is found to be safest when applied to use, and to keep said elevators and equipment in perfect repair and to use due and ordinary care in the selection of skillful and competent operators for operating said elevators; and if you find from the evidence in this case that the defendant has performed these duties you must find your verdict for the defendant.

VERDICT

The jury having first retired rendered its verdict for $9,500.00 in favor of the plaintiff and against the defendant. Thereafter, within thirty days from the rendition of said verdict and the judgment thereon, the defendant duly filed and presented to the court its motion for a new trial, which motion having been duly continued to the 17th day of January, 1925, was on said date heard upon resubmission of the evidence given in the trial of said cause, and was overruled. To the order of the court overruling said motion, the defendant then and there excepted. Said motion with the orders endorsed by the court thereon was as follows:

MOTION TO SET ASIDE VERDICT AND JUDGMENT AND FOR A NEW TRIAL—Omitted; printed side page 16 ante

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[fol. 60] Notice of motion for a new trial omitted; printed side page 23 ante.

MINUTE ENTRIES

Nov. 26, 1924.—Filed and presented, and ordered to be heard on the 6th day of December, 1924, and execution ordered suspended until motion heard. Joe C. Hail, Judge of the Circuit Court.
Dec. 6, 1924.—Cont'd to Dec. 13, 1924. Denson, J.
Dec. 13, 1924.—Cont'd to Dec. 20, 1924. Denson, J.
Dec. 20, 1924.—Cont'd to Jan. 10, 1925. Denson, J.
Jan. 10, 1925.—Cont'd to Jan. 17, 1925. Denson, J.
Jan. 17, 1925.—Motion over-ruled. Deft. excepts. Denson, J.

Wherefore the appellant prays that this, its bill of exceptions, may be allowed, settled and signed.

J. P. Mudd, Attorney for Appellant.

[fol. 61] Presented and indorsed on this, the 26th day of January, 1925.

John Denson, As Circuit Judge, etc.

ORDER SETTING BILL OF EXCEPTIONS

Allowed, settled, signed and sealed as and for a true and correct bill of exceptions in said cause on this, the 4th day of March, 1925.

John Denson.

SUPERSEDEAS BOND ON APPEAL FOR $19,000.00—Approved and filed Jan. 31, 1925; omitted in printing

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[fol. 62] CITATION—In usual form, showing service on Beddow & Ray; filed Jan. 31, 1925; omitted in printing

[fol. 63] IN CIRCUIT COURT OF JEFFERSON COUNTY

CLERK'S CERTIFICATES

THE STATE OF ALABAMA,
Jefferson County:

I, Woolsey Morrow, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing pages numbered from one to sixty, inclusive, contain a full, true, correct and complete transcript of all proceedings in this Court in a cause wherein Willis Yeldell, as Administrator of the Estate of Carrie Yeldell, Deceased, is Plaintiff, and Louis Pizitz Dry Goods Company, Inc., a corporation, is Defendant. I further certify that on the 31st day of January, 1925, the Defendant prayed for and obtained an appeal to the present term of the Supreme Court of Alabama; and that Louis Pizitz Dry Goods Company, is principal, and American Surety Company of New York, is surety for the judgment and all costs and that said surety in writing has waived its right to claim personal property as exempt under the laws of the State of Alabama, all of which appears of record in this Court, and all of which I hereby certify to the Clerk of the Supreme Court.

Witness my hand and seal of said Court this the 11th day of March, 1925.

Woolsey Morrow, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama. (Seal.)

[fol. 64] CERTIFICATE OF APPEAL

IN CIRCUIT COURT OF JEFFERSON COUNTY

THE STATE OF ALABAMA,
Jefferson County:

I, Woolsey Morrow, Clerk of the Circuit Court in and for said County and State, do hereby certify that in the cause of Louis Pizitz Dry Goods Company, Inc., a corporation (Defendant), Appellant, vs. Willis Yeldell, as Administrator of the Estate of Carrie Yeldell, Deceased (Plaintiff), Appellee, which was tried and determined in this Court on the 30th day of October, 1924, wherein judgment was rendered in favor of the Plaintiff in the sum of Ninety Five Hundred & 00/100 ($9,500.00) Dollars, the Defendant prayed for and obtained an appeal to the Supreme Court of Alabama, to be holden in and for said State.

I further certify that on the 31st day of January, 1925, the Defendant filed Supersedeas Bond and Security for Costs to the Supreme Court of Alabama, and that American Surety Company of New York, is surety on said bond for judgment and all costs of said appeal.

I further certify that on the 2nd day of February, 1925, notice

of said appeal was duly served on Beddow & Ray, Attorneys of Record for said Appellee.

Witness my hand and seal of office this the 4th day of February, 1925.

Woolsey Morrow, Clerk Circuit Court Tenth Judicial Circuit of Alabama. (Seal Circuit Court Tenth Judicial Circuit, Alabama.)

[fol. 65] IN SUPREME COURT OF ALABAMA

No. 31179

LOUIS PIZITZ DRY GOODS COMPANY, INC., a Corporation (Defendant), Appellant,

vs.

WILLIS YELDELL, as Administrator of the Estate of CARRIE YELDELL, Deceased (Plaintiff), Appellee

ASSIGNMENTS OF ERROR

Comes the appellant, and says there is manifest error in the record, and for grounds thereof, assigns the following separately and severally:

1. The court erred in rendering judgment in the case at bar because the Homicide Act, (Sec. 2486 Code of 1907) is unconstitutional and void. Record, Page 13.

2. The court erred in rendering judgment in the case at bar because the Homicide Act is in violation of Section 23, of the Constitution of Alabama, and is, therefore, void. Record, Page 13.

3. The court erred in rendering judgment in the case at bar, because it was contrary to the law. Record, Page 13.

4. The court erred in rendering judgment in the case at bar, because it was contrary to the evidence. Record, Page 13.

5. The court erred in rendering judgment in the case at bar, because it was contrary to the law and the evidence. Record, Page 13.

6. The court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that it does not appear with sufficient certainty, what duty, if any, the defendant may have owed to the plaintiff." Record, Page 3.

7. The court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that it does not appear with sufficient certainty, wherein the defendant violated any duty the defendant may have owed to the plaintiff." Record, Page 3.

8. The court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that it

does not sufficiently appear that the defendant owed any duty to the plaintiff, which the defendant negligently failed to perform." Record, page 3.

[fol. 66] 9. The court erred in overruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that there does not appear sufficient causal connection between defendant's said alleged breach of duty, and plaintiff's injury and damage." Record, page 3.

10. The court erred in overruling defendant's demurrer to the amended complaint, said demurrer being as follows: "That it appears from the averments thereof that plaintiff's cause of action is based wholly upon a statute known as Sec. 2486 of the Code of Alabama of 1907, as amended, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law. Record, Page 5.

11. The court erred in over-ruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that it appears from the complaint and each count thereof, that the plaintiff's cause of action is based wholly upon a statute known as Section 2486 of the Code of Alabama 1907, as amended, which statute is void as to the defendant, by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law." Record, Page 5.

12. The court erred in over-ruling defendant's demurrer to the amended complaint, said demurrer being as follows: "For that said complaint, and each count thereof, although claiming punitive damages alone, does not charge the defendant with any wilful misconduct or with that entire want of care which would raise the presumption of a conscious indifference to consequences." Record, Page 5.

13. The court erred in over-ruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "That it appears from the averments thereof that plaintiff's cause of action is based wholly upon a statute known as Section 5696 of the Code of Alabama of 1923, which is void as to the defendant by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law." Record, page 5.

14. The court erred in over-ruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that it [fol. 67] appears from the complaint, and each count thereof, that the plaintiff's cause of action is based wholly upon a statute known as Section 5696, of the Code of Alabama 1923, which is void as to the defendant, by reason of the 14th Amendment to the Constitution of the United States, for that it would deprive the defendant of its property without due process of law. Record, Page 5.

15. The court erred in over-ruling the defendant's demurrer to the amended complaint, said demurrer being as follows: "For that it does not appear what duty, if any, the defendant owed to the plaintiff which defendant negligently failed to perform." Record, Page 5.

16. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 1, reading as follows: "If you believe the evidence in this case you must find your verdict for the defendant." Record, Page 10.

17. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 2, reading as follows: "If you believe the evidence in this case you cannot find your verdict for the plaintiff." Record, Page 10.

18. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 6, reading as follows: "I charge you that if you believe from the evidence that an ordinarily reasonable and prudent person would have operated an elevator under circumstances similar to those under which the plaintiff's intestate was killed, without closing the inner elevator doors, then you must find your verdict for the defendant." Record, Page 10.

19. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 9, reading as follows: "If from the evidence you believe that the defendant's agent or servant was operating the elevator car with that degree of care, prudence and skill which an ordinarily careful and prudent man would have done under similar circumstances, you must find your verdict for the defendant." Record, Page 10.

20. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 11, reading as follows: "I charge you that the defendant is not an insurer of the [fol. 68] safety of passengers lawfully upon its elevators, but is required only to use reasonable care under the circumstances to protect them from injury resulting from the operation of the elevator car." Record, Page 10.

21. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 12, reading as follows: "I charge you that under the complaint in this cause, in determining what you shall assess as damages, that you cannot assess punitive damages but are confined to compensatory damages, that is, such damages as may adequately compensate for the actual loss sustained to the plaintiff in this cause. Record, Page 10.

22. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 13, reading as follows: "I charge you that under the complaint in this cause you cannot assess punitive damages against the defendant." Record, Page 9.

23. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 15, reading as follows: "I charge you that if you believe the evidence in this case, you cannot award the plaintiff more than nominal damages." Record, Page 11.

24. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 16, reading as follows: "I charge you that if you believe from the evidence that the conduct of the defendant's servant in running the elevator on the occasion complained of fell short of wilful misconduct, which is that entire want of care which would raise a presumption of conscious indifference to consequences, you cannot find your verdict for the plaintiff." Record, Page 11.

25. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 17, reading as follows: "I charge you that unless you believe from the evidence that some officer of the defendant corporation was guilty of negligence which proximately contributed to the death of the plaintiff's intestate, or subsequently ratified the negligent act of the operator which contributed to the death of plaintiff's intestate, you cannot [fol. 69] find your verdict against the defendant." Record, Page 12.

26. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge No. 18, reading as follows: "I charge you that if you believe from the evidence that the elevator on the occasion complained of was operated in an ordinarily careful and prudent manner, you must find your verdict for the defendant." Record, Page 12.

27. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge "A" reading as follows: "I charge you that the defendant's only duty to persons using its elevators in its store, either as customers or by their invitation or request, is to use all reasonable means and efforts to furnish good and well-constructed elevators and elevator equipment adapted to the purpose of its use, of good material and of the kind which is found to be safest when applied to use, and to keep said elevators and equipment in perfect repair, and to use due and ordinary care in the selection of skillful and competent operators for operating said elevators; and if you find from the evidence in this case that the defendant has performed these duties, you must find your verdict for the defendant." Record, Page 12.

28. The court erred in refusing to give to the jury, at due request of the defendant, its written charge "B" reading as follows: "I charge you that if you believe from the evidence in this case that the defendant used the highest degree of care known to mankind, in the selection of a competent elevator operator to run its elevator on the occasion complained of, and used the highest degree of care known to man to provide safe elevators for the transportation of persons using said elevators in their store, either as customers or by

their invitation or request, you must find your verdict for the defendant." Record, Page 12.

29. The court erred in refusing to give to the jury, at the due request of defendant, its written charge "C" reading as follows: "I charge you that if you believe from the evidence in this case that the defendant exercised the highest degree of care in the selection of [fol. 70] elevator equipment used on this occasion, and employed competent and skillful engineers to install the same, and thereafter competent and skillful experts to inspect said elevator equipment, at regular and frequent intervals, just prior to the accident, to guard against any defects or faulty construction or faulty operation and such examination by said experts failed to find any defects or faults in construction or operation, your verdict must be for the defendant." Record, Page 12.

30. The court erred in refusing tto give to the jury at the due request of the defendant, its written charge "D" reading as follows: "I charge you that if you believe from the evidence that the defendant prior to the accident in this cause, exercised the highest degree of care which a careful and prudent man could exercise in the selection of an operator to run the elevator on the occasion when the plaintiff's deceased was killed, and exercised the same degree of care in installing the elevator and elevator equipment and keeping the same in good condition and free from defects, that you must find your verdict for the defendant." Record, Page 11.

31. The court erred in refusing to give to the jury, at the due request of the defendant, its written charge "F" reading as follows: "I charge you that unless you believe from the evidence that the defendant itself, was guilty of some negligence on the occasion complained of, over and above the negligence of the elevator operator, herself, that you must find your verdict for the defendant." Record, Page 11.

32. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial, as follows: "The verdict of the jury was excessive." Record, Page 21.

33. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial as follows: "The verdict of the jury was contrary to the evidence in the case. Record, Page 14.

34. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial as follows: "The verdict of the jury was contrary to the law." Record, page 14.

[fol. 71] 36. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial, as follows: "The judgment of the court was contrary to the preponderance of the evidence." Record, Page 14.

37. The court erred in refusing to grant this appellant a new trial on the grounds set forth, separately and severally, in its motion for a new trial. Record, Page 14.

38. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial, as follows: "On the ground that the plaintiff's right of action was based upon the so-called "Homicide Act," said Act being known as Section 2486 of the Code of 1907, and Section 5696 of the Code of 1923, which said Act is unconstitutional and void as being contrary to the 14th amendment of the Constitution of the United States." Record, Page 21.

39. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial, as follows: "On the ground that the plaintiff's right of action was based upon the so-called "Homicide Act," being known as Section 2486 of the Code of 1907 and Section 5696 of the Code of 1923, which said Act is void and unconstitutional under the 14th Amendment of the Constitution of the United States, in that said act undertakes to impose punitive damages upon an employer or master who is free from blame and negligence for the torts committed by his employee." Record, Page 21.

40. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial as follows: "On the ground that said judgment is void and contrary to natural justice because there was no evidence to show that the defendant was in any wise negligent or blame-worthy in causing the death of the plaintiff's intestate." Record, Page 21.

41. The court erred in refusing to grant this appellant a new trial on the ground set forth in its motion for a new trial as follows: "On the ground that punitive damages were imposed upon this defendant, although there was no evidence tending to show that the defendant was in any wise guilty of negligence causing the death of the plaintiff's intestate." Record, Page 21.

[fol. 72] 42. The court erred in sustaining plaintiff's objection to the following question asked by Defendant's counsel to witness "Tipton:" "Did you regard her as a competent and skilled elevator girl?" Record, Page 36.

43. The court erred in sustaining plaintiff's objection to the following question asked by defendant's counsel to witness "Tipton:" "State how, or what method was used, of selecting operators to run that car?" Record, Page 36.

44. The court erred in sustaining plaintiff's objection to the following question asked by defendant's counsel to witness "Tipton:" "Do you know of your own knowledge, what care is exercised in the employing of operators of these cars?" Record, Page 37.

45. The court erred in sustaining plaintiff's objection to the following question asked a witness by defendant's counsel, and excluding the answer from the jury's consideration: "Did you endeavor to select the best elevator possible for the particular use to which you wished to put it?" Record, Page 38.

46. The court erred in not severely rebuking the plaintiff's attorney for making the following remark to the jury in the course of his argument: "Defendant caters to the country people, and invites them there to trade. Country people, and people of all classes would come there to trade, and he advertised goods for country people, and also to be sold to everybody." Record, Page 43-44.

47. The court erred in failing to take proper measures to rectify the effect of the remark by plaintiff's counsel in his argument to the jury, as follows: "Defendant caters to the country people, and invites them there to trade. Country people and people of all classes would come there to trade, and he advertised goods for country people, and also to be sold to everybody," was an ineradicable poison calculated to seriously prejudice and injure the defendant's case with the jury. Record, Page 43-44.

48. The remark by plaintiff's counsel in his argument to the jury "Defendant caters to the country people, and invites them there to trade. Country people and people of all classes would come there to trade, and he advertised goods for country people, and also to be sold to everybody" was prejudicial and harmful to the defendant and not justified or supported by any evidence in the case,—and is reversible [fol. 73] error. Record, Page 43-44.

49. The court erred in refusing to grant this appellant a new trial on the ground that the following charge, duly requested, should have been given for this appellant: "If you believe the evidence in this case, you cannot find your verdict for the plaintiff." Record, Page 16.

J. P. Mudd, Attorney for Appellant, Louis Pizitz Dry Goods Company, a Corporation.

[fol. 74] IN SUPREME COURT OF ALABAMA

[Title omitted]

OPINION

ANDERSON, C. J.:

This action was brought under what is generally known as the "Homicide Act," Section 5696 of the Code of 1923, and appellants' counsel has made quite a vigorous and lengthy attack on the same as being repugnant to certain provisions of the Constitution, Federal and State. While the damages thereby provided have been heretofore defined as punitive and not compensatory, they must be founded upon an actionable wrong and for such conduct it is within the police

power of the State to fix punitive damages by way of punishment. Indeed, this statute has existed for over a half century and its constitutional validity was upheld over thirty years ago in the case of R. & D. R. R. v. Freeman, 97 Ala. 289, and we do not think it subject to any of the grounds of attack made in brief of counsel. This holding also is supported by the case of United States Cast Iron Pipe Co. v. Sullivan, 3rd Fed. Reporter (2nd) Page 794. Certiorari denied by U. S. Supreme Court May 11th, 1925.

If the defendant operated an elevator for the purpose of transporting its customers from one floor to another and a customer was [fol. 75] injured while in or entering said elevator, the defendant would be liable to him for injuries proximately caused by the failure to exercise the highest degree of care or skill exercised in the management and operation of elevators of a similar character and nature. This upon the theory that the relation of carrier and passenger existed between them,—Morgan v. Saks, 143 Ala. 139; O'Rourke v. Woodward, 77 South. 679. The trial court did not therefore err in so instructing the jury or in refusing the defendants' instructions predicated upon an ordinary degree of skill and care.

We are not persuaded that the defendant was entitled to the general charge as for a failure to prove the averment, that defendant was engaged in the dry goods business where goods are sold to the public and that the intestate was at the time of her injury a customer in said dry goods store for the purpose of trading. The very name of the defendant imports the fact that it was engaged in the dry goods business and the evidence shows that the intestate entered the store and the elevator for the purpose of purchasing a hat.

The only count submitted to the jury, count "A," is for the negligent operation of the elevator by the agent or servant in control of same and there was no charge of negligence for the want of skill or care in the selection of said agent or servant. Therefore, the trial court did not err in not permitting the defendant to prove the skill and competency of said agent or servant or the care exercised by the defendant in her selection.

That part of the argument of plaintiff's counsel which is the basis of assignments of error 46, 47, and 48, was in part responsive to a remark of the defendants' counsel and the other portion could probably have been inferred by the nature and character of defendants' business. But be this as it may, the trial court excluded it about as affirmatively and positively as possible and we can not put the trial court in error to reverse for refusing the motion for a new trial because of this argument.—Thames v. L. & N. R. R., 208 Ala. 255.

[fol. 76] We are not persuaded that the trial court was in error for failing to grant the defendant a new trial because the verdict was excessive. The damages are punitive and we can not say that the verdict indicates passion or prejudice on the part of the jury and it is much smaller than many heretofore affirmed by this court wherein the facts showed no greater negligence or aggravation than in the case at bar.

The judgment of the Circuit Court is affirmed.

Affirmed.

Somerville, Thomas, and Bouldin, J. J., concur.

[fol. 77] IN SUPREME COURT OF ALABAMA

[Title omitted]

Present: Chief Justice Anderson and Associate Justices Somerville, Thomas and Bouldin.

* * * * * * *

ARGUMENT AND SUBMISSION—April 21, 1925

Come the parties by attorneys, and argue and submit this cause for decision.

* * * * * * *

The Court adjourned until Thursday, April 23rd, 1925, at 10 o'clock A. M.

IN SUPREME COURT OF ALABAMA

[Title omitted]

Present: Chief Justice Anderson and Associate Justices Somerville, Thomas and Bouldin.

* * * * * * *

JUDGMENT—May 28, 1925

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant, and American Surety Company of New York, surety on the appeal bond, pay the amount of the judgment of the Circuit Court, and ten per centum damages thereon, and interest, and the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, let execution issue accordingly.

* * * * * * *

[fol. 78] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed June 26, 1925

To the Honorable John C. Anderson, Chief Justice of the Supreme Court of Alabama:

Comes the plaintiff in error (Appellant) in the above styled cause, by its attorney, J. P. Mudd, and shows:

That on to-wit: March 15th, 1924, Willis Yeldell, as administrator of the estate of Carrie Yeldell, deceased, brought suit in the Circuit Court of Jefferson County, Alabama, to recover damages for the death of the said Carrie Yeldell. The complaint alleged, in substance, that the defendant operated a dry goods store in the City of Birmingham, where dry goods were sold to the public, and that the deceased went there to trade as a customer; that while riding upon a passenger elevator in the defendant's said store, the deceased was caused to fall to the floor of the elevator, and as a result thereof was mashed to death between the floor of the elevator car and the elevator shaft. The plaintiff claimed that the defendant's death was due to the negligence of a servant of the defendant in the operation of the elevator car. It was not claimed or charged that the defendant itself was guilty of any negligence except insofar as the negligence of the elevator operator could be imputed to the defendant under the principle of respondent superior. The cause of action was based upon a statute of the State of Alabama, known as the Homicide Act (Section 5696 of the Code of Alabama of 1923, and Section 2486 of the Code of Alabama of 1907). The case was tried in the Circuit Court of Jefferson County on to-wit: November 30th, 1924, and a verdict of $9,500.00 was rendered in favor of the plaintiff and against the defendant.

[fol. 79] The said Homicide Act, under which the suit was brought, is as follows:

"A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not

subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the satute of distributions. Such action must be brought within two years from and after the death of the testator or intestate."

The Supreme Court of Alabama, in its opinion of the case at bar, construed the measure of damages recoverable under said Homicide Act as purely punitive, and not in any wise compensatory, and such ruling has been the uniform holding of the Supreme Court of Alabama for a long number of years.

The plaintiff in error, (Appellant), insisted at every stage of the trial by pleadings, by objections to evidence, by motion for a new trial, and by brief and argument in the Supreme Court of Alabama, that the so-called Homicide Act (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), was contrary to the Fourteenth Amendment to the Constitution of the United States for the reasons assigned in the Assignments of Error filed herewith, and for the further reasons:

(1) That said statute imposed punitive damages upon this defendant for an act of negligence on the part of the defendant's servant.

(2) For that said statute imposed punitive damages on this defendant, who was not shown to have been guilty of any fault or dereliction of duty.

(3) That the judgment and decree of the trial court, affirmed by the Supreme Court of Alabama, subjected the plaintiff in error to the imposition of punitive damages for the mere negligent act of a servant of the defendant, without any showing that the defendant itself was in any wise guilty of negligence or of any fault or [fol. 80] dereliction of duty.

(4) For that the Homicide Act deprived the defendant of its property without due process of law by inflicting punitive damages upon it for a mere tort of its servant or agent, acting within the line and scope of her employment.

(5) For that the Homicide Act denied the defendant the equal protection of the law, as granted by the Fourteenth Amendment to the Constitution of the United States, by inflicting damages upon it for a mere tort of its servant or agent, acting within the line and scope of his employment.

(6) For that the judgment and decree of the trial court, which was affirmed by the Supreme Court of Alabama, deprived this defendant of its property without due process of law, and denied to it the equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

(7) To reverse the judgment of the trial court in favor of the defendant in error and against the plaintiff in error (Appellant) in the sum of $9,500.00, the plaintiff in error (Appellant) took an

appeal to the Supreme Court of Alabama, that being the highest court of law or equity of the State of Alabama, in which a decision could be had in said cause, assigning therein as error the judgment of the trial court, and complaining that the so-called Homicide Act (Section 5690 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), was contrary to the Fourteenth Amendment to the Constitution of the United States, and that the infliction of punitive damages upon this Appellant without a showing of some negligence on its part was a denial of due process of law and the equal protection of the law.

Upon a consideration of said cause on appeal, the Supreme Court of Alabama upheld the constitutionality of said Homicide Act of Alabama against attack under the Fourteenth Amendment to the United States Constitution, and adjudged that the judgment of the trial court was not contrary to the Fourteenth Amendment to the United States Constitution, saying:

"While the damages thereby provided have been heretofore defined as punitive, not compensatory, they must be founded upon an actionable wrong, and for such conduct it is within the police power of the State to fix punitive damages by way of punishment. * * * [fol. 81] The only count submitted to the jury, Count A, is for the negligent operation of the elevator by the agent or servant in control of same, and there was no charge of negligence or the want of skill or care in the selection of said agent or servant. Therefore, the trial court did not err in not permitting the defendant to prove the skill and competency of said agent or servant, or the care exercised by the defendant in her selection."

The said judgment of the Supreme Court of Alabama was the final judgment of said court, and no re-hearing is now pending in said court in this cause.

Petitioner therefore shows that a Federal question was presented and made in said cause, to-wit: as hereinabove set out, and that said judgment of said Supreme Court of Alabama was repugnant to and in conflict with the provision of the Constitution of the United States above referred to, and that said judgment of said Supreme Court of Alabama was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States to said Supreme Court of Alabama be allowed; that citation be granted and signed; that the bond herewith presented be approved and a supersedeas granted; and execution stayed that the errors complained of may be reviewed in the Supreme Court of the United States; and that the judgment aforesaid of said Supreme Court of Alabama be reversed.

Louis Pizitz Dry Goods Company, Inc., by J. C. Mudd, Its Attorney of Record and Attorney-in-fact.

[fol. 82] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed June 26, 1925

This the 26th day of June, 1925, came the plaintiff in error, Louis Pizitz Dry Goods Company, Inc. and filed herein and presented to me, John C. Anderson, Chief Justice of the Supreme Court of Alabama, the petition attached hereto, praying for the issuance of a writ of error intended to be urged by it, and praying also that a transcript of the record, proceedings and papers under which the judgment herein was rendered by the Supreme Court of Alabama, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be necessary in the premises.

On consideration whereof, the said writ of error is hereby allowed, upon the plaintiff in error, Louis Pizitz Dry Goods Company, Inc giving bond according to law in the sum of nineteen thousand dollars ($19,000.00), which bond being forthwith given and approved, let the writ of error issue as prayed for. Said bond shall operate as a supersedeas of the judgment in this cause, and execution shall be stayed.

John C. Anderson, Chief Justice of the Supreme Court of Ala.

This the 26 day of June, 1925.

[fol. 83] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

WRIT OF ERROR—Filed June 25, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a suit which is in the said Supreme Court of Alabama, before you or some of you, being the highest court of law and equity in said State, in which a decision could be had in said suit between Louis Pizitz Dry Goods Company, Inc., as Appellant, and Willis Yeldell, as Administrator of the estate of Carrie Yeldell, deceased, as Appellee, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States, and decision was in favor

of such validity, and manifest error has happened to the great damage of said Louis Pizitz Dry Goods Company, Inc. as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment thereof be given, that then, under your seals, distinctly and openly, you send the record and proceedings as aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, D. C. within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct these errors, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this the 26th day of June, in the year of our Lord, One thousand nine hundred twenty-five.

George Stuart, Clerk of the United States District Court for the Middle District of Alabama. (Seal of the United States District Court, Middle District of Alabama.)

John C. Anderson, Chief Justice of the Supreme Court of Alabama.

[fol. 84] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 26, 1925

And now comes the Louis Pizitz Dry Goods Company, Inc., petitioner and plaintiff in error, by J. P. Mudd, its attorney, and in connection with its petition for a writ of error shows that in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of Alabama in the above entitled cause, manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

(1) The Supreme Court of Alabama erred in affirming the judgment of the Circuit Court of Jefferson County.

(2) The Supreme Court of Alabama erred in not reversing and rendering the judgment of the Circuit Court of Jefferson County, Alabama.

(3) The Supreme Court of Alabama erred in not sustaining the claim of the plaintiff in error (Appellant) that the Homicide Act of Alabama (Section 5696 of the Code of Alabama of 1923, and

Section 2486 of the Code of Alabama of 1907), was unconstitutional and invalid in virtue of being contrary to Section One of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of Alabama erred in holding the Homicide Act of Alabama (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), as a legitimate exer- [fol. 85] cise of the State police power.

(5) The Supreme Court of Alabama erred in holding that said Homicide Act of Alabama (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), imposing punitive damages upon the defendant for the negligent act of an agent, is not repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

(6) The Supreme Court of Alabama erred in holding that said Homicide Act of Alabama (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), imposing punitive damages upon the defendant for the negligent act of an agent, is not repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(7) The Supreme Court of Alabama erred in affirming the judgment of the trial court subjecting the plaintiff in error to punitive damages for the tort of its agent, and refusing to allow the defendant to prove that the defendant itself was not guilty of any fault or dereliction of duty.

(8) The Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), as applied to the facts of the case at bar, deprived the plaintiff in error of its property without due process of law in that it inflicted punitive damages upon it, although free from all fault, for the simple negligence of an agent of the defendant, acting within the line and scope of her employment.

(9) The Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), as applied to the facts of the case at bar, denied to the plaintiff in error the equal protection of the law, in that it inflicted punitive damages upon it, although free from all fault, for the simple negligence of an agent of the defendant, acting within the line and scope of her employment.

(10) The Supreme Court of Alabama erred in refusing to hold that the Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), when applied to the facts in the case at bar, was unconstitutional to [fol. 86] the Fourteenth Amendment to the Constitution of the United States.

(11) The Supreme Court of Alabama erred in holding that the defendant was liable for punitive damages under the Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section

2486 of the Code of Alabama of 1907), although the defendant itself was not charged with any want of care or any dereliction of duty.

(12) The Supreme Court of Alabama erred in adjudging that the defendant was liable for punitive damages for the death of the plaintiff's intestate, when it was not claimed or shown that the defendant itself was guilty of any negligence, or any want of care, or dereliction of duty.

(13) The Supreme Court of Alabama erred in holding that the plaintiff in error was properly denied the right to prove the skill and competency of its agent or servant, and the care exercised by the defendant in the selection of said servant or agent.

(14) The Supreme Court of Alabama erred in holding the plaintiff in error liable for punitive damages for the negligence of its agent or servant in such sum as the jury might in its discretion assess.

(15) The Supreme Court of Alabama erred in holding the plaintiff in error punishable by the imposition of damages for such sum as the jury may in its discretion assess.

(16) The Supreme Court of Alabama deprived the plaintiff in error of its property without due process of law by subjecting it to a penalty without limit as a punishment for the negligence of an agent or servant acting within the line and scope of his employment.

Wherefore, the plaintiff in error, Louis Pizitz Dry Goods Company, Inc. prays that the said judgment of the Supreme Court of Alabama be reversed.

Louis Pizitz Dry Goods Company, Inc., by J. P. Mudd, Its Attorney of Record.

[fol. 87] Bond on Writ of Error for $19,000.00—Approved; omitted in printing

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[fol. 88] Citation—In usual form, showing service on Beddow & Ray; filed June 26, 1925; omitted in printing

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[fol. 89] [File endorsement omitted]

In Supreme Court of Alabama

[Title omitted]

Præcipe for Transcript of Record—Filed June 26, 1925

In the above entitled cause in which a writ of error has been allowed from the Supreme Court of the United States to the Supreme

Court of Alabama, and duly filed in the office of the Clerk of the Supreme Court of Alabama, the plaintiff in error is required by the rules of the Supreme Court of the United States to file this, its præcipe, indicating the portions of the record which the plaintiff in error deems important and necessary to be incorporated in the transcript of the record for the Supreme Court. The transcript should include

(1) All pleadings of every kind in the case.
(2) All the decrees and orders in the case.
(3) All the proceedings in the trial court including the evidence as shown by the bill of exceptions.
(4) All proceedings in the trial court in reference to the appeal to the Supreme Court of Alabama.
(5) The Assignments of Error in the Supreme Court of Alabama.
(6) The opinion of the Supreme Court of Alabama.
(7) The judgment of the Supreme Court of Alabama.
(8) All the proceedings relating to the suing out or allowance of the writ of error from the Supreme Court of the United States to the Supreme Court of Alabama, including the petition, writ of error, assignments of error, citation, bond, and a copy of this præcipe, with the evidence of service thereof on opposing counsel.

J. P. Mudd, Attorney of Record and Attorney-in-fact.

[fol. 90] We hereby accept service of a copy of the foregoing præcipe.

Beddow & Ray, Attorneys for Defendant in Error.

[fol. 91] IN SUPREME COURT OF ALABAMA

[Title omitted]

CLERK'S CERTIFICATE AND RETURN TO WRIT OF ERROR

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from one (1) to ninety (90), both inclusive, contain a true, full and complete transcript of the record and proceedings had in said Court in the case of Louis Pizitz Dry Goods Company, Inc., Plaintiff in Error, versus Willis Yeldell, as Administrator of the Estate of Carrie Yeldell, Deceased, Defendant in Error, together with a true and correct copy of the opinion of the said Court in said cause, as the same appear of record and on file in this office; and also the petition for writ of error, order allowing writ of error, the writ of error, assignments of error, copy of supersedeas bond, citation to Defendant in Error, and præcipe for transcript of record.

In testimony whereof, I have hereunto affixed my official signature as Clerk of the Supreme Court of Alabama, and have caused

the Seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, on this the 8th day of July, A. D. 1925.

Robert F. Ligon, Clerk of the Supreme Court of Alabama.
(Seal of the Supreme Court of Alabama.)

[fol. 92] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF RECORD TO BE PRINTED WITH PROOF OF SERVICE—Filed July 20, 1925

Comes the plaintiff in error, and files with the Clerk of this Court a definite statement of the points on which it intends to rely, said points being as follows:

(1) The Supreme Court of Alabama erred in affirming the judgment of the Circuit Court of Jefferson County.

(2) The Supreme Court of Alabama erred in not reversing and rendering the judgment of the Circuit Court of Jefferson County, Alabama.

(3) The Supreme Court of Alabama erred in not sustaining the claim of the plaintiff in error (Appellant) that the Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, and Section 2486 of the Code of Alabama of 1907), was unconstitutional and invalid in virtue of being contrary to Section One of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of Alabama erred in holding the Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), as a legitimate exercise of the State police power.

(5) The Supreme Court of Alabama erred in holding that said Homicide Act of Alabama (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), imposing punitive damages upon the defendant for the negligent act of an agent, is not repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

(6) The Supreme Court of Alabama erred in holding that said Homicide Act of Alabama (Section 5696 of the Code of Alabama of [fol. 93] 1923, Section 2486 of the Code of Alabama of 1907), imposing punitive damages upon the defendant for the negligent act of an agent, is not repugnant to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(7) The Supreme Court of Alabama erred in affirming the judgment of the trial court subjecting the plaintiff in error to punitive damages for the tort of its agent, and refusing to allow the defendant to prove that the defendant itself was not guilty of any fault or dereliction of duty.

(8) The Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), as applied to the facts of the case at bar, deprived the plaintiff in error of its property without due process of law in that it inflicted punitive damages upon it, although free from all fault, for the simple negligence of an agent of the defendant, acting within the line and scope of her employment.

(9) The Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), as applied to the facts of the case at bar, denied to the plaintiff in error the equal protection of the law, in that it inflicted punitive damages upon it, although free from all fault, for the simple negligence of an agent of the defendant, acting within the line and scope of her employment.

(10) The Supreme Court of Alabama erred in refusing to hold that the Homicide Act of Alabama (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907) was contrary to the Fourteenth Amendment to the Constitution of the United States.

(11) The Supreme Court of Alabama erred in holding that the defendant was liable for punitive damages under the Homicide Act of Alabama, (Section 5696 of the Code of Alabama of 1923, Section 2486 of the Code of Alabama of 1907), although the defendant itself was not charged with any want of care or any dereliction of duty.

(12) The Supreme Court of Alabama erred in adjudging that the defendant was liable for punitive damages for the death of the [fol. 94] plaintiff's intestate, when it was not claimed or shown that the defendant itself was guilty of any negligence, or any want of care, or dereliction of duty.

(13) The Supreme Court of Alabama erred in holding that the plaintiff in error was properly denied the right to prove the skill and competency of its agent or servant, and the care exercised by the defendant in the selection of said servant or agent.

(14) The Supreme Court of Alabama erred in holding the plaintiff in error liable for punitive damages for the negligence of its agent or servant in such sum as the jury might in its discretion assess.

(15) The Supreme Court of Alabama erred in holding the plaintiff in error punishable by the imposition of damages for such sum as the jury may in its discretion assess.

(16) The Supreme Court of Alabama deprived the plaintiff in error of its property without due process of law by subjecting it to a penalty without limit as a punishment for the negligence of an agent or servant acting within the line and scope of his employment.

The plaintiff in error deems the entire record transmitted by the Clerk of the Supreme Court of Alabama to the Supreme Court of the United States as necessary for consideration of the questions involved.

J. P. Mudd, Attorney for Plaintiff in Error.

Service of the foregoing statement and notice is hereby accepted, and all further service waived.

Beddow & Ray, by Bell F. Ray, Attorney for Defendant in Error.

[fol. 95] [File endorsement omitted.]

Endorsed on cover: File No. 31,329. Alabama Supreme Court. Term No. 606. Louis Pizitz Dry Goods Company, Inc., plaintiff in error, vs. Willis Yeldell, as administrator of the estate of Carrie Yeldell, deceased. Filed July 17, 1925. File No. 31,329.

Office Supreme Court, U. S.
FILED
JAN 17 1927
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

274
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No. 171

LOUIS PIZITZ DRY GOODS COMPANY,
Plaintiff in Error, (Defendant Below)
vs.
WILLIS YELDELL, as Administrator of the Estate of Carrie Yeldell, deceased,
Defendant in Error, (Plaintiff Below)

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

J. P. MUDD,
Attorney for Louis Pizitz Dry Goods Company,
Plaintiff in Error.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 171

LOUIS PIZITZ DRY GOODS COMPANY,
Plaintiff in Error, (Defendant Below)
vs.
WILLIS YELDELL, as Administrator of the Estate of
Carrie Yeldell, deceased,
Defendant in Error, (Plaintiff Below)

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

J. P. MUDD,
Attorney for Louis Pizitz Dry Goods Company,
Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 171

LOUIS PIZITZ DRY GOODS COMPANY,
Plaintiff in Error, (Defendant Below)
vs.
WILLIS YELDELL, as Administrator of the Estate of Carrie Yeldell, deceased,
Defendant in Error, (Plaintiff Below)

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

PRELIMINARY STATEMENT

The writ of error in this case is sued out to review a judgment of the Supreme Court of the State of Alabama, the highest court in the state, which affirmed a judgment of the Circuit Court of Jefferson County, in favor of the plaintiff below (defendant in error here) in an action by the plaintiff, as administrator of the estate of Carrie Yeldell, for the death of said Carrie Yeldell, deceased.

The opinion of the Supreme Court of Alabama in this case below rendered May 28, 1925 is reported in 213 Ala. Rep. 222, 104 So. 526 Record p. 50. The action was brought under what is known in Alabama as the Homicide Statute, (Section 2486 of the Code of Alabama

of 1907 as amended by General Acts of 1911, page 484, which is the same as Section 5696 of the present Code of Alabama, 1923).

The ground upon which the jurisdiction of this court is invoked is that the Homicide Statute of Alabama is violative of the due process clause and the equal protection clause of the 14th Amendment. The precise questions raised in the trial court and in the Supreme Court of Alabama appear in the following statement of the case.

STATEMENT OF THE CASE

This action was brought by the administrator of the estate of Carrie Yeldell, deceased, to recover from the defendant (plaintiff in error) the penalties allowable under the Homicide Act for the alleged wrongful death of the deceased. The plaintiff in error (hereinafter referred to as the defendant) operated a dry goods store in Birmingham. The deceased, Carrie Yeldell, was visiting the store as a customer, who, as such, was using the elevator to go from one floor to the other. There was evidence tending to show that the elevator in starting gave a quick move, which caused the defendant to lose her balance and fall forward. The cause of the quick movement was not shown. The inner gates of the elevator carriage were not closed at that time, and there was testimony to show that the deceased in falling forward was caught between the edge of the floor of the elevator car and the walls of the elevator shaft, resulting in her immediate and instant death. There was no claim or contention that the acts or omissions of the elevator operator were done willfully or wantonly. The only count was one for simple negligence. The most that

was contended was that the elevator operator was guilty of negligence in failing to use the highest degree of care in operating the elevator. Upon the trial of the case a judgment was rendered in favor of the plaintiff (defendant in error) and against the defendant for the sum of $9,500.00.

In the trial court and in the Supreme Court of Alabama the defendant made timely insistence that the said Homicide Act of Alabama as applied to the facts of this case was unconstitutional and void for being repugnant to the 14th Amendment of the United States Constitution. (See defendant's demurrers, record, page 3. Defendant's motion for a new trial, Record, pages 12 to 18, inclusive. Assignments of error, Record, pages 44 to 50, inclusive. Opinion of the Supreme Court of Alabama in the case at bar, Record, page 60; 213 Ala. Rep. 222; 104 So. Rep. 526.

The Supreme Court of Alabama rejected the defendant's contention, and expressly held that the said Homicide Act was not unconstitutional on account of any repugnancy to the 14th Amendment.

The said Homicide Statute for a good many years has been construed by the Supreme Court of Alabama to be purely and exclusively penal and without any element of compensation and to exist for the sole purpose of punishing defendants, and making public examples of them, thereby deterring others from the commission of wrongful acts which result in death. This statute is also construed by the Supreme Court of the State of Alabama as authority for juries to assess unlimited punishment against a principal or master for the negligent act of a servant or agent, without the necessity of charging any actual wrong against either principal or master, and without permitting either to plead or prove his innocence

or freedom from fault; it being held that by virtue of the statute any principal or master may be punished who, without regard to his innocence or fault, merely happened to have in his service an agent or servant chargeable with negligence or misconduct in the line and scope of his employment, causing death.

The statute requires the jury in each case to fix the penalty according to its unbridled discretion, without any method of ascertainment, and without any limit to the amount it may impose by way of punishment or penalty upon the defendant. The courts of Alabama decline to review or modify the penalties assessed by juries under this statute, unless it be proved that prejudice or passion actually influenced the jury in fixing the amount of its verdict. In the absence of evidence that the jury was so influenced by passion or prejudice, the sky is the limit for any amount the jury may impose as a penalty

The penalty or punishment inflicted upon a non-participating master for the wrongful act of a servant is not dependent upon any malice or upon any willful, wanton or aggravated conduct on the part of the servant, but is imposable upon a master, himself free from fault, for the simple negligence of a servant, which resulted in death to another.

The statute only applies to wrongful acts which result in death. It has no application where personal injuries are inflicted which do not result in death.

The contention of the plaintiff in error is that the actual operation of the said Homicide Statute, as applied to the facts of the case at bar, is unreasonably oppressive, arbitrary, unjust, violative of the fundamental conceptions of fair play, and contrary to natural justice, and, therefore, repugnant to the 14th Amendment, as will more fully appear in the argument which follows.

ARGUMENT

The Homicide Statute of Alabama (Section 2486 of the Code of Alabama of 1907, as amended by Acts of 1911, page 484; Section 5696 of the Code of Alabama of 1923) violates the due process clause of the 14th Amendment.

The Homicide Act reads as follows:

> "A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distribution. Such action must be brought within two years from and after the death of the testator or intestate."

Consider the peculiarities and characteristics of the above statute with the interpretations put upon it by the Supreme Court of Alabama. These interpretations en-

ter into and become a part of the statute when under review by the United States Courts.

Douglas v. Noble 261 U. S. 165, 67 L. Ed. 590.

Quong Ham Wah Co. vs. Ind. Ac. Coun. 255 U .S. 445 65 L. Ed. 723.

I.

PECULIARITIES AND CHARACTERISTICS

(1) The damages recoverable under the Homicide Act are solely and exclusively punitive, they being in such sum "as the jury may assess."

Louis Pizitz Dry Goods Co. v. Yeldell, 104 So. 526; 213 Ala. 222.

Alabama Power Co. v. Stogner, 95 So. 151; 208 Ala. 666.

Richmond & Danville R. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800.

Holt & Stollenmerck 56 So. 912, 174 Ala. 213.

Kuykendall v Edmondson 87 So. 882; 205 Ala 265.

The statute was formerly construed by the Supreme Court of Alabama as authorizing an award of compensatory damages, but this construction has been changed for a number of years, so that the sum now recoverable is regarded as a penalty, and is imposed by way of punishment.

Alabama Power Co. v. Stogner, 95 So. 151, 208 Ala. 666.

Richmond & Danville R. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800.

PUNISHMENT IS IMPOSED AS A DETERRENT TO OTHERS

"The damages recoverable being punitive and exemplary in all cases under the statute—punitive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite diligence in the avoidance of fatal casualties—the purpose being the preservation of human life regardless of the pecuniary value of a particular life to next of kin under statutes of distributions, the admeasurement of the recovery must be by reference alone, to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without any reference to, or consideration of the loss or injury the act or omission may occasion to the living." Richmond & Danville R. R. C. vs. Freeman, 97 Ala. 292, 294; 11 So. 800 (Quoted as above in Ala. P. Co. v. Stoegner, 95 So. 151).

2. ADMINISTRATOR SUES AS AGENT OF THE LEGISLATOR

"The right to prosecute an action for the wrongful death of his decedent is vested by the statute creating the right (Code 2486) in the personal representative for a definite legislative purpose, to prevent homicide.

"In prosecuting such action, the personal representative does not act strictly in his capacity as administrator of the estate of his decedent but rather he is asserting a right arising after his death and because the damages recovered are not subject to the payment of the debts or liabilities of the decedent. He acts rather as an agent of legislative appointment for the effectuation of the legislative policy, and upon recovery as a quasi trustee for those who

stand in the relation of distributee to the estate strictly so called." Holt v. Stollenwerck, 56 So. 912; 174 Ala. 213.

Kuykendall v. Edmonson, 87 So. 882, 205 Ala. 265.

Ala. Power Co. v. Stogner, 95 So. 151 208 Ala. 666.

Although it is said that the administrator sues as the agent of the legislature, the administrator need not sue if he does not wish to. Suit by the administrator is left entirely discretionary; yet the object of the suit is to vindicate an important public policy, viz: Prevention of homicides by inflicting punishment upon the wrongdoer. The administrator has the authority to sue upon, or compromise, the claim arising on account of his intestate's death, or he may do neither. In fact, the sole beneficiary or distributee under the statute of distributions can settle and discharge the claim so as to defeat the suit by the administrator.

Hines v. Seibels, 86 So. 43; 204 Ala. 382.
Alabama Power Co. v. Stogner, Supra.

The cause of action for the recovery of the penalty does not abate by the death of the defendant, but can be revived against his personal representative. Section 5696, Code 1923, Section 2486, Code 1907, as amended. Richmond & Danville R. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800.

(3) The damages that can be inflicted under the Homicide Act upon a master for even the simple negligence of his servant are unlimited, and in such sum as the jury may assess.

Central of Georgia Rwy. Co. v. Ellison, 199 Ala. 571; 75 So. 159.

Mobile Electric Co. v. Fritz, 200 Ala. 692; 77 So. 235.

In the Ellison case supra the highest court of Alabama said, "This court, so far as we recall, has never set aside a verdict because excessive, in an action brought under this statute to prevent homicides."

In the Fritz case supra the court held itself powerless to set aside the verdict although stating frankly that the damages seemed unjust and excessive;—"*We would not have inflicted a punishment so severe*," *the court said.*

The discussion of this statute in these two cases is worthy of note and, more fully quoted, is as follows:

> "While the judgment in this case is very large, the statute makes the damages recoverable purely punitive, and expressly declares that the damages shall be such 'as the jury may assess.' The statute was passed to punish offenders, to the end of preventing homicides.
>
> In Buckalew's case it was said, construing this statute as to the amount and measure of damages:
>
> 'The amount of the recovery . . . . . is left to the sound discretion of the jury, to be wisely and impartially exercised, in view of all the circumstances of the case shown in evidence.' 112 Ala. 160, 20 South, 606.
>
> This court, so far as we recall, has never set aside a verdict because excessive, in an action brought under this statute to prevent homicides; and it has declined to set aside a verdict for one cent because inadequate. L. & N. R. R. Co. v. Street, 164 Ala. 155, 51 South

306, 20 Ann. Cas. 877. The only instance we find in our reports, where a verdict in an action like this was set aside because excessive, is in the case K. C. M. & B. R. R. Co. v. Sanders, 98 Ala. 293, 13 South, 57, and that action was by the trial court, the verdict there being for $44,500 damages. No appeal appears to have been taken from that ruling, but the final verdict, which went to judgment was for $13,500. The appeal from such judgment was affirmed; the trial court and this court declining to set the verdict aside because excessive." Central of Ga. Ry. Co. v. Ellison, 199 Ala. 571, 75 South, 159-163.

"As to the verdict's being excessive, the figures themselves show that it is very large—much larger than is common in homicide cases, in which no compensatory damages can be awarded. As we have often said, such damages being purely punitive, and the statute saying that the amount shall be such as the jury may assess, it is obvious that no definite amount or standard is afforded by the statutes as to any particular case. . . . . As the amount of the verdict and the severity of the punishment are graded according to the degree of culpability, and the jury were authorized to find the highest degree of culpability, we cannot know that the verdict was not based on such finding. If we found such a degree of blameworthiness, then, of course, the severest punishment might be awarded. While, of course, a verdict may be so large as to show that it was influenced by improper motive, and not meted as deserved punishment, yet we are not convinced that such was the case in this instance, notwithstanding we feel that had the matter been left to us we would not have inflicted a punishment so severe. The law has seen fit to expressly say that

the amount of the verdict in such cases shall be such as the jury may assess." Mobile Elec. Co. v. Fritz, 200 Ala. 692, 77 South, 235.

(4) The penalty under the Homicide Act goes to the next of kin, according to the statute of distribution, and if there is no next of kin, the penalty recovered escheats to the State of Alabama. Section 5696, Code of Alabama, 1923, and annotations. The penalty recovered is not subject to the payment of the deceased's debts, but goes direct to the next of kin without toll or abatement.

Ala. Power Co. v. Stogner, 95 So. 151, 208 Ala. 666.

Holt v. Stollenwerck, 56 So. 912, 174 Ala. 213.

5696 Code of Ala. 1923, and annotations.

(5) Although the penalty is in such sum "as the jury may assess," and is, in a sense, a fine imposed upon the theory of punishment, the defendant is required to testify and give evidence against himself. He is not given the safeguards which commonly surround a defendant in a criminal trial, such as being confronted by the witnesses who accuse him, and being convicted only after the jury believe him guilty beyond a reasonable doubt. The imposition of the penalty under the Homicide Statute does not prevent his indictment and prosecution in a criminal action, and punishment in a criminal suit is not admissible in mitigation of damages under the Homicide Act.

For criminal offenses the legislature fixes a maximum penalty. The Homicide Act leaves the amount of the penalty and the method of ascertainment entirely

with the jury, unlimited, and the courts decline to review or modify the penalties assessed by the juries, unless it is shown that they were influenced by passion or prejudice. Such a showing is practically impossible. In having the absolute right to fix the amount of the penalty without any limits prescribed, the jury usurps legislative functions. This unlimited penalty under the Homicide Act, as hereinabove pointed out, can be inflicted upon an innocent master in a case where there has been no willful or wanton conduct even on the servant's part, and no actual damage or any monetary loss to the deceased's estate. The deceased may have been 100 years old and had no expectancy, or earning power, or may have been a hopeless invalid, an object of charity, with neither earning power or expectancy. Yet, the penalty for his death can be unlimited under the Homicide Statute.

(6) The defendant can not be punished under the Homicide Act (Section 5696 of the Code of 1923) for negligently causing another's death if the deceased himself was guilty of contributory negligence.

Section 5696 of the Code of Alabama of 1923, and annotations. 2486 Code of 1907.

Lawrence v. Seay, 60 So. 937; 179 Ala. 386.

Ala. Power Co. v. Stogner, 95 So. 151; 208 Ala. 666.

(7) The administrator can not sue under the Homicide Statute for the wrongful death of a minor, where the father of the child has elected to sue under Section 5695 of the Code of 1923 (Section 2485 of the Code of 1907). And the father in his suit under Section

5695 of the Code of Ala. 1923, (Section 2485 of the Code of Alabama, 1907) for the negligent death of his child is not allowed to recover damages if either he or his deceased child were guilty of negligence which proximately contributed to cause the child's death.

Ala. Power Company v. Stogner, 95 So. 151.

(8) The administrator is barred from bringing his suit under the Homicide Act for the wrongful death of his intestate against one tort feasor whose negligence contributed to cause the deceased's death, if the administrator has, prior to the institution of said suit, made a settlement with the other tort feasor. And if the administrator pursues his action under the Homicide Statute to judgment against one of the two tort feasors and obtains satisfaction of that judgment, he can not thereafter sue the other tort feasor.

McCoy v. Louisville and Nashville R. R. Co., 40 So. 106; 146 Ala. 333.

(9) If the servant of the defendant while acting within the line and scope of his employment negligently kills a servant of a third person who is also within the line and scope of his employment, and both servants are subject to the provisions of the Workmen's Compensation Act of Alabama, the defendant is not punishable under the Homicide Act at the suit of the deceased's administrator. The administrator, under those circumstances, has no cause of action whatever.

Georgia Casualty Co. v. Hagood, 97 So. 87, 210 Ala. 56.

The only cause of action for such wrongful death is vested in the *dependents* of the deceased employe. The right given to the dependents is to recover the compensation allowed under the Workmen's Compensation Act. If the deceased employe left no dependents, there would be no cause of action.

The Supreme Court of Alabama in the Hagood case, 97 So. 87, 210 Ala. 56, said:

> "The Homicide Statute is not repealed by the Compensation Act, but is limited in cases like the one now under consideration," (i. e., where one employe kills another by an accident arising out of the line and scope of their employment)—"to be enforced in behalf of the dependents of the deceased employe, and in such cases the right of the administrator to pursue the remedies thereunder is withdrawn."

(10) If the deceased and the defendant are both subject to the State Employer's Liability Act or to the Federal Employer's Liability Act, so far as the particular injury causing death is concerned, the defendant is not punishable under the Homicide Statute at the suit of the deceased's administrator. The administrator is given a cause of action to recover damages but the damages are purely compensatory,—not penal or punitive.

> Thomas Furnace Co. v. Carroll, 85 So. 455; 204 Ala. 263.

(11) Where the deceased dies from prenatal injuries wrongfully inflicted by the defendant, there is no cause of action by the administrator under the Homicide Statute, although the defendant's wrongful act may amount to murder, and be punishable as such.

Stanford vs. St. Louis & San Francisco R. R. Co., 108 So. 566; 214 Ala. 611.

(12) Where the deceased's death is caused by the negligent act of a servant of the Director General of Railroads, the administrator of such deceased has no cause of action against the Director General under the Homicide Statute.

Howard v. Davis, 95 So. 354; 209 Ala. 113.

"It is true that in the case of Sou. Ry. Co. Bush, 122 Ala., 470, 26 South, 168, this court held that the Homicide Statute was not such a penal one, strictly speaking, as to excuse answering interrogatories under the constitutional provision there invoked, but it did not hold that the damages recoverable were not punitive as distinguished from compensatory, just as the Arkansas court held that the statute involved in the Mo. Pac. R. R. case supra (technically' did not prescribe a penalty, yet the Supreme Court of the United States held that, whatever name may be applied to it by the state court, it presented the question of federal, and not of state, law, and that the element of punishment clearly predominated, while the damages provided by our statute, as construed by many decisions of this court, are entirely punitive. As suggested by counsel for the appellant, this result renders our homicide statute abortive and inoperative as to deaths caused by the operation of railroads while under federal control; but we must bow to the highest authority in deciding federal questions, and "Render, therefore, unto Caesar the things which are Caesar's." Howard v. Davis, Director General of Roads, 95 So. 354.

With the foregoing characteristics and peculiarities of the Homicide Statute in mind, we approach the question of whether such a statute can be justified under the police power of the state.

II

THE CONSTRUCTION GIVEN A STATUTE BY THE HIGHEST COURT OF THE STATE—SINCE IT IS PURELY A MATTER OF STATE LAW—ENTERS INTO AND BECOMES A PART OF THE STATUTE WHEN UNDER REVIEW BY THE UNITED STATES COURTS.

Douglas v. Noble, 261 U. S., 165, 67 L. Ed. 590.

Quong Ham Wah Co. v. Ind. Ac. Com., 255 U. S. 445, 65 L. Ed. 723.

At common law there can be no recovery of damages for causing death. Hence a statute of a state, which gives such a right, is purely local in character, and exists within the form and confines given it by the highest court of the state.

As stated by the United States Supreme Court in the case of Southwestern T. & T. Co. v. Danaher, 238 U. S. 482; 59 L. Ed., 1419, where excessive penalties were held unconstitutional for being repugnant to the 14th Amendment:

> "Of course, it is not open to us to revise the construction placed upon the statute by the State Court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene

> the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve."

If the Homicide Statute can be sustained, it must be sustained under the police power. And whether such statute is a valid legislative enactment under the police power depends upon whether or not it is unreasonably oppressive, arbitrary, unjust, contrary to natural justice, and opposed to the principles of fair play. We grant that a certain indulgence must be made in favor of legislative enactments, but the legislative determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts.

> Yu Cong. Eng. v. Trinidad, 70 L. Ed. 710 (Advance Sheets).
>
> Meyer v. Nebraska, 262 U. S. 390; 67 L. Ed. 1042; 43 Sup. Ct. Rep. 625.

The avowed purpose of the Homicide Act is to prevent homicides—a laudable aim and purpose. But it does not follow that every legislative enactment with that purpose in view is constitutional. Almost every unconstitutional law is enacted with a worthy aim and purpose. But the United States Constitution is the supreme law of the land, designed for the protection of the individual against arbitrary and oppressive legislative encroachments and the legislature of no state can override that Constitution, regardless of how worthy its purposes and aims may be. As was said in Lochner vs. New York, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint."

And, again, in the same case the United States Supreme Court said:

> "It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and, therefore, any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of police power."

The defendant in error (plaintiff below) advanced as an argument in favor of the constitutionality of the statute the fact that it had been long in force in Alabama. This is similar to the argument advanced in

the case of Adkins vs. Children's Hospital, 67 L. Ed. 785; 261 U. S. 525, where the United States Supreme Court held the statute there under consideration invalid. The Supreme Court said:

> "We are asked, upon the one hand, to consider the fact that several states have adopted similar statutes, and we are invited, upon the other hand, to give weight to the fact that three times as many states, presumably as well informed and as anxious to promote the health and morals of their people, have refrained from enacting such legislation. We have also been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary. These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or the undesirability of the legislation but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads."

III

THE DEFENDANT (PLAINTIFF IN ERROR) WILL BE DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW BY THE ENFORCEMENT OF THE PENALTY OF $9500.000, INFLICTED BY THE JURY UNDER THE HOMICIDE ACT OF ALABAMA.

The defendant itself committed no wrong, and was guilty of no dereliction of duty. The alleged wrongdoing of the defendant's servant was the operation of

the elevator without closing the inner gates. There was no charge or claim that this conduct was wanton, malicious, willful or aggravated. The wrong of the defendant's servant was in the failure "to exercise the highest degree of care, skill and diligence in conserving the safety of those who were on the elevator. (See court's charges, Record, page 6).

The trial court refused at the request of the defendant the following written instructions to the jury:

> "If from the evidence you believe that the defendant's agent or servant was operating the elevator car with that degree of care, prudence and skill which an ordinarily careful and prudent man would have done under similar circumstances, you must find your verdict for the defendant" Record, page 8, Charge No. 9.
>
> "I charge you that unless you believe from the evidence that the defendant itself was guilty of some negligence on the occasion complained of over and above the negligence of the elevator operator herself, that you must find your verdict for the defendant." (Record, page 9, Charge No. 13).

And the Supreme Court of Alabama in its opinion in the case at bar, 104 So. 526, 527, 213 Ala. 222, said:

> "The only count submitted to the jury, Count A, is for the negligent operation of the elevator by the agent or servant in control of the same, and there was no charge of negligence for the want of skill or care in the selection of said agent or servant." (Record, page 51).

Therefore, we have a case where the master has been assessed a penalty of $9500.00 by way of punish-

ment for the failure of a servant to exercise the highest degree of care, skill and diligence, and wherein no other dereliction of any nature on the part of the defendant was claimed or charged. It is not charged or claimed that the corporate defendant itself ratified or approved the negligent act, or that the corporate defendant failed to exercise due care in the selection of the elevator operator or the elevator equipment. The complaint itself charges that the negligent act was the act of the defendant's agent. Record page 2.

As previously stated, the theory underlying the Homicide Act is that the penalty or punishment inflicted by the jury will serve to deter others from the commission of wrongful acts which result in death. If punishment by a jury in whatever amount it may wish to assess is ever justified for the commission of a wrongful act, causing death to another, the punishment should be inflicted upon the wrong-doer himself, that is, the one at fault. It is he who should be made an example of. Punishment of a third party, the master, who is innocent, does not make an example of the wrongdoer. If punishment is deserved by anyone under the facts of the case at bar, it is the servant or agent who failed to exercise the highest degree of care and skill in operating the elevator.

It may be admitted that the punishment of a master or principal for the wrong of the servant or employe might have the remote and speculative effect of deterring others from the commission of wrongful acts causing death. The same might be said of the punishment of any innocent person for the negligent act of a third person. On this theory the owner of an elevator could be punished for every death that occurred on the elevator,

regardless of fault of any one or the circumstances under which the death occurred. So could one be punished for the wrong of his brother, a parent for the wrong of his child or one for the wrong of his relative, since such punishment might tend remotely to minimize wrongdoing; but such principle is not in accord with our theory of jurisprudence, nor with our conception of justice or morality. If all the judges of the Supreme Court were made liable to a penalty when one of the judges negligently killed a person, (for example, by negligently striking him with his automobile,) this might remotely tend to increase the care with which each judge would drive his automobile; for each judge would desire to spare his brother judges the imposition of such a penalty. Such a statute would be preposterous. None of the relationships mentioned could afford any basis for punishing the innocent.

That a punishment may deter others is alone quite insufficient to justify its infliction. It is said that in some semi-civilized countries all the male and female relatives of a criminal are paraded naked through the streets. Such ignominy heaped upon innocent relatives under some false theory of attainder of blood must in some degree have a deterring effect upon other would-be offenders.

The relationship of master and servant affords no basis for punishing vicariously the innocent master. If the innocent master has exercised due care in the selection of competent employes and suitable equipment, what more can he do? If, after that, he is punished for an act of another, for which he is blameless, what will that punishment deter him from doing in the future? What will it deter other masters from doing? The only

possible effect would be to deter him and others from employing any servants and from doing business through employes and servants. Is it the policy of the law to hinder business by making it perilous to transact business through employes and servants? The punishment of the master for the wrongful act of the servant will not serve to deter other servants from wrong-doing, for it is not the servant that is being punished for his wrongful act. Of course, if it is shown that the defendant himself is derelict, then suitable punishment, within limits well defined by the legislature, for his dereliction, might be just.

The Supreme Court of the United States has recognized the injustice of vicarious punishment inflicted upon the master for the torts of the agent. In the case of Lakeshore & Michigan R. R. Company v. Prentice, 147 U. S. 101, 37 L. Ed. 97, the United States Supreme Court used the folowing language:

> "In this court, the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." 37 L. Ed. at p. 101.
>
> "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be

> awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, can not be held for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent." 37 L ed at p. 101.

The Supreme Court quotes with approval the following language:

> "The right to award them (punitive damages) rests primarily upon the single ground—wrongful motive. It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite. Absence of all proof bearing on the essential question, to-wit, defendant's motive—cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine respondeat superior. . . . " 37 L. ed. at p. 102.

The Supreme Court (in the Prentice Case, supra), quotes the following from Hagan v. Provident W. R. & Co., 3 R. I. 88, 91:

> "In cases where punitive or exemplary damages have been assessed it has been done upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach

> the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty. Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages, for the injury sustained in consequence of the wrongful act of a person acting as his servant." 37 L. Ed. at page 104.

We recognize that no local statute authorizing punitive damages was involved in the Prentice case, supra;—yet the language of the Supreme Court makes clear the injustice of punishing one who is free from fault (the master) for the tort of another (the servant). The Supreme Court fully appreciates that the "absence of all proof bearing on the essential question, to-wit: the defendant's motive—cannot be permitted to take the place of evidence, without leading to a most dangerous extention of the doctrine of respondeat superior."

In every case where the constitutionality of a statute is attacked, and it is sought to be justified under the police power, the question of unreasonableness, arbitrariness, injustice, harshness and the like is one of degree. The Homicide Statute, as applied to the facts of the case at bar, is unreasonable, arbitrary, harsh and unjust and contrary to principles of natural justice.

In the case of Arizona Copper Company v. Hammer, 250 U. S. 400, 63 L. Ed. 1059 the United States Supreme Court recognizes the injustice of punishing anyone who is free from fault.

The Supreme Court had before it for consideration a statute which required an employer to pay damages for any personal injury received by an employee. The Supreme Court of the United States seemed unanimously of the opinion that, if penal, the statute would violate the "Due Process Clause" of the Federal Constitution. Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds held the statute to be penal in its effect and, in their opinion, written by Mr. Justice McKenna, denounced it most vigorously in the following terms (250 U. S. at page 436).

> "It seems to me to be the very foundation of right—of the essence of liberty as it is of morals— to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame; and yet the court now by its decision erects the denial of these postulates of conduct into a principle of law and government policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty, and invert the conceptions of mankind of the relation of right and wrong action . . . . Of course, reasons may be found for the violation of rights—advantage to somebody or something in that violation. Tyranny even may find pretext and seldom boldly bids its will avouch its acts, and certainly there can be no

> accusation of bare-faced power in the Arizona law. Its motives and purposes are worthy and it requires some resolution of duty to resist them."

The five justices who upheld the Arizona statute expressly approved the aforestated principles but were of the opinion that the statute was *compensatory* in a true sense, and *not penal in any respect*—hence, that the language used by Mr. Justice McKenna was inapplicable.

Mr. Justice Pitney in his opinion for the majority remarked that the statute had been construed by the state court to impose only "*a liability in compensatory damages—excluding all such as are speculative or punitive* and therefore pointed out his agreement with the principles stated by Mr. Justice McKenna, but denied their application to that case. One of the pertinent excerpts from his opinion for the majority is as follows:

> "There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages."

Again (250 U. S. 430) he takes it clearly for granted that if the Arizona courts should ever construe the statute as the Alabama Homicide Statute is construed, it would be unconstitutional, his language being as follows:

> "To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related or dependent upon the workman, or even may go by es-

cheat to the state, it is sufficient to say that no such question is involved in these records; in Arizona Copper Co., v. Burciago,—Ariz.—, 177 Pac. 29, a case of personal injuries not fatal, the supreme court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may so be construed in its application to death claims; *and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the Federal Constitution.*" (The italics are not in the original).

In line with the principles aforestated, the Supreme Court of the United States, *by a bare majority of one* upheld the Arizona Compensation Act for the following reasons, none of which could have application to the Alabama Homicide Statute, viz:

(a) An employer's freedom from fault would be immaterial because the statute created no new losses but merely shifted previously-sustained losses from the employee to the hazardous industry in which he received them, making the industry bear the losses as a part of the "overhead" expense, all of which was in accordance with the decisions of the court in other, earlier compensation cases (See New York Central v. White 243 U. S. 188 61 L. Ed. 667, and particularly the excerpts therefrom which are below quoted).

(b) Being *compensatory*, the damages could never be unlimited because they must necessarily, in each case, be co-extensive with the injury. If the admeasurement by a jury should prove unsatisfactory, the higher court could always make sure that proper rules for

> the admeasurement thereof had been applied. Furthermore, the method of admeasurement, i. e., by a jury, even if sometimes highly unsatisfactory, is nevertheless the common law method and therefore does not contravene the Constitution.

But it is stated in no uncertain terms that if the Arizona statute had been penal, the court would have declared it unconstitutional.

The principle that an employer who is himself guiltless of all wrong may nevertheless be required to render *compensation* for injuries inflicted by his employees has been established in numerous cases which have arisen under workmen's compensation acts. In these cases it has been pointed out that the statutes *create no new losses but merely shift existing losses onto other shoulders.* Also it is clear that even at common law there were cases in which losses to employees, or even to strangers, were considered under the doctrine of *respondent superior* as properly a part of the "overhead" cost of an undertaking and therefore assessable as damages against those who expected to reap the net pleasure or profit of undertakings.

The rule of *respondeat superior* as applicable strictly to *compensation*, was fully and carefully considered in the case of New York Central v. White, 243 U. S. 188, 61 L. Ed. 667:

> "The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the

> act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result."

Compensation from the faultless principal or master whose enterprise has caused loss to another is quite different from punishment inflicted upon a person, well-known by the court to be innocent, merely because a relative, servant or agent has done some wrong. Sound reasons are advanced for such compensation; but none can be stated for such punishment.

IV.

THE HOMICIDE ACT IS UNJUST AND UNREASONABLY OPPRESSIVE ON THE FURTHER GROUND THAT THERE IS NO LIMIT TO THE PUNISHMENT WHICH A JURY MAY APPLY TO A DEFENDANT IN ANY CASE ARISING UNDER IT, AND, THEREFORE, IT DEPRIVES A DEFENDANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

As pointed out supra, the Homicide Statute prescribes the penalty in such amount "as the jury may assess." And the courts decline to set aside a verdict under the Homicide Act because it is excessive. There are no limits prescribed by the legislature within which the jury may punish by the infliction of the penalty. Events might happen after the commission of the act which would inflame the public mind against acts of the kind the defendant or his servant committed and which would

influence a jury to increase the penalty beyond what it would otherwise have imposed but for the happening of such event. To allow the jury to impose whatever penalty it pleases, without restraint, borders close upon the principle of ex post facto laws. It is the right of every American citizen to have the limits of the punishment defined by the legislature beyond which juries can not go. Penalties fixed in legislative halls, dealing with offenses in the abstract are certain to be more just than ex post facto penalties imposed upon a defendant at a moment when he is an object of scorn, perhaps from an unjust accusation.

V.

THE HOMICIDE ACT IS ARBITRARY AND OPPRESSIVE FOR IT IS SO INDEFINITE IN DEFINING THE WRONG THAT IS PUNISHABLE THAT IT IS EQUIVALENT TO A DELEGATION OF LEGISLATIVE POWERS TO COURTS AND JURIES TO DETERMINE WHAT ACTS SHALL CALL FOR THE PENALTY.

> The penalty is levied in the jury's discretion for "the wrongful act, omission, or negligence of any person or persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence if it had not caused death." etc.

Section 5696 of the Code of Alabama of 1923.

Section 2486 of the Code of Alabama of 1907, as amended.

The "wrongful" act is not defined. This statute is analogous to the statute which makes it unlawful for a

railroad to charge more than a just and reasonable rate, and fixing a penalty for any violation thereof. Such a statute was denounced in the case of Louisville & Nashville Railroad Company v. Commonwealth, 35 S. W. 129, 99 Ky. 132, where the court said:

> "There is no standard whatever fixed by the statute or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our systems of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by the jury; and especially so as that standard must be variable and uncertain, as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

The Court also quotes with approval the following language:

> "Penalties cannot thus be inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the lawmaking power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission." L. & N. R. R. Co. v. Commonwealth, 35 S. W. 129, at page 130.

We also quote from the case of Chicago & N. W. R. R. Co. vs. Dey, 35 Federal, 866, page 876, concerning a similar statute:

> "Now the contention of complainant is that the substance of these provisions is, that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain no man being able to tell in advance what in fact is, or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in legal matters.' See, also, U. S. v. Sharp, Pet. C. C. 122; The Enterprise, 1 Paine, 34; Bish. St. Cr. Section 41; Lieb. Herm. 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows:
>
> > 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows, and when the impropriety is of a serious nature, with eighty blows.'
>
> There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

The Homicide Statute of Alabama is as indefinite as the statute which the United States Supreme Court held unconstitutional in the case of United States vs. Cohen Grocery Company, 255 U. S. 81; 65 L. Ed. 516. The statute made it unlawful "for any person willfully * * * * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," etc.

The Supreme Court said regarding such a statute:

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact ,we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the sections would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

VI.

THE DEFENDANT IN THE CASE AT BAR IS DENIED THE EQUAL PROTECTION OF THE LAWS BY THE HOMICIDE STATUTE OF ALABAMA FOR THE FOLLOWING REASONS:

The Homicide Act does not inflict punishment for every "wrongful" act which results in injury to another.

It only inflicts punishment for those wrongful acts:

(1) Which result in death,

(2) Where the deceased could have maintained an action at common law if he had not been killed.

There are many instances at common law where the deceased, if living, could not have maintained a suit for the wrongful act. Therefore, the punishment of the defendant is made to depend not altogether on the quality of the wrongful act, but on whether the deceased could have maintained an action at common law for the injuries resulting from said wrongful act, if the deceased had not died.

Thus, if the deceased was guilty of contributory negligence, the wrong-doer can not be punished under the Homicide Statute for any act of simple negligence causing death. Whether or not a tort feasor deserves punishment should not be dependent upon whether someone else was guiltless of wrong-doing.

If the injured party could not have maintained an action at common law because of the fact that he and the tort feasor were both subject to the provisions of the Workmen's Compensation Act of Alabama, then the administrator is not permitted to sue for the penalty under the Homicide Statute.

Georgia Casualty Company v. Haygood, 97 So. 87, 210 Ala. 56.

In the case at bar, if the deceased Carrie Yeldell, at the time of her death had been an employe of a third party, and as such was riding the defendant's elevator within the line and scope of her employment, and was killed by the negligent operation of the elevator by a servant of the defendant, the administrator of Carrie Yeldell's estate would have no cause of action whatever.

Georgia Casualty Co. v. Haygood, supra.

Only those who were dependents of the deceased could sue, and in such suit the recovery would be limited to the specific compensation prescribed in the Workmen's Compensation Act of Alabama. Ga. Casualty Company v. Haygood, supra. On the other hand, if there were another passenger on the elevator who was not a servant or employee and who was killed by the same negligent act of the defendant's servant, the administrator of the estate of that deceased passenger could sue for the penalty under the Homicide Act, and thereby inflict unlimited punishment upon the defendant. The punishment of the defendant would, therefore, depend upon the particular employment status of the deceased.

If the tort feasor and the deceased both come within the provisions of the State Employer's Liability Act, the tort feasor is not subject to the provisions of the Homicide Act. The administrator is confined to actual compensatory damages under Section 7598 of the Code of Alabama of 1923 (Employers Liability Act) for the wrongful death of his intestate.

At the risk of repetition, the court's consideration of the following illustrations is invited to show the arbitrary conditions upon which the operation of the Homicide Statute is made to depend:

Suppose A is a principal or master, and B is the servant who drives a truck as A's chauffeur. B has been selected by A with the greatest skill and care, and A reasonably believes him to be a highly competent chauffeur. Let us suppose B, while acting within the line and scope of his employment, negligently drives his truck over C, and kills him.

(1) If C at the time of the accident were a servant of D and subject to the provisions of the Workmen's Compensation Act, and were acting within the line and scope of his employment at said time, C's administrator would have no cause of action whatever. He could not sue under the Homicide Statute or any other statute. The sole right of action for the death of C would vest in C's dependents under the Workmen's Compensation Act of Alabama.

(2) If C were not subject to the Workmen's Compensation Act, but C was himself guilty of contributory negligence, C's administrator could not recover under the Homicide Statute.

If C were not subject to the Workmen's Compensation Act, and his death was the result of the combined negligence of B and another tort feasor, E, a satisfaction of a claim against E by C's administrator would bar C's administrator from proceeding against B under the Homicide Statute.

(3) If C were a minor child, C's father or mother would have the prior right to sue under Section 5695 of the Code of Alabama of 1923 (Section 2485 of the Code of 1907), and an election by the parent to sue deprives the administrator of the right thereafter to sue under the Homicide Statute. In the suit by the parent, the contributory ngeligence of either the child or the parent defeats recovery.

The above exceptions are wholly arbitrary. If a tort feasor deserves punishment in one case, another tort feasor deserves punishment if he kills someone under the same circumstances. Neither the status of the deceased with reference to his employment or the fact that the deceased or deceased's parent was guilty of contributory

negligence should be reason for not punishing the wrongdoer, when others are punished for the same kind of wrongs. Thus, it is seen that the operation of the statute inflicting punishment is dependent upon so many arbitrary and irrelevant conditions and circumstances that it is obviously unreasonable and highly discriminatory, and as such, denies this plaintiff in error the equal protection of the law.

It seems to us that if the Homicide Statute is constitutional, it would then be within legislative competency.

(1) To declare that a principal should be liable to puntive damages as punishment for the torts of an independent contractor.

(2) To declare that a parent should be punished for the torts of his child, whether such torts cause death or personal injuries.

(3) To declare that a master should be punished for the torts of his servant, regardless of whether he was acting within the line and scope of his employment at the time, and regardless of whether such tort caused death or merely personal injuries.

(4) To declare that a master should be subject to imprisonment for the torts of his servant, which caused death or personal injuries to another, and the length of the term of imprisonment left to the discretion of the jury with no limits fixed by the lgeislature.

(5) To declare that any act whether due to negligence or not which resulted in death or personal injury to another should be punished by any amount the jury might assess.

Negligence is defined by the lower court (Record, page 5) as the "failure to do what an ordinarily prudent

person would have done under the same circumstances or the doing of that which an ordinarily prudent person would not have done under the same or similar circumstances."

The standard of care is measured by what the "ordinarily prudent person" would have done or omitted to do. Could the legislature under its police power change the definition of negligence so as to make the standard of due care that care which a "perfectly prudent (or extraordinarily) prudent, intelligent and skillful person" would have exercised under the same or similar circumstances; and having changed to this definition make any failure to conform to the standard of a theoretically perfect person resulting in death to another, punishable by a penalty in whatever amount the jury might assess? We think not. Yet it might serve as a deterrent to others from committing acts which result in death to third persons.

VII.

THE UNITED STATES SUPREME COURT HAS DECLARED UNCONSTITUTIONAL MANY STATUTES IMPOSING UNREASONABLE AND UNJUST PENALTIES WHERE THE STATUTE WAS NOT NEARLY SO ARBITRARY, OPPRESSIVE, UNJUST AND UNREASONABLE AS THE HOMICIDE STATUTE OF ALABAMA.

For example, in the case of St. Louis I. M. & S. R. R. Co. v. Wynne, 32 Sup. Court 493, 224 U. S. 354, 56 L. Ed. 799, the Supreme Court held that a statute exacting double liability and an attorney's fee from a railway company refusing to pay within thirty days an excessive de-

mand for the killing of live stock by one of its trains takes the company's property without due process of law.

The court said:

> "We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law."

And in the case of Missouri Pacific R. R. Company vs. Tucker, 57 L. Ed. 1507, 33 Sup. Ct. 961, 230 U. S. 340, it was held that the imposition by Kansas laws 1905, Chapter 353, of a liability of $500.00 as liquidated damages, together with a reasonable attorney's fee, for every charge by a common carrier in excess of the rates therein fixed for the shipments of oil between points in the state, was so oppressive and arbitrary as to constitute a taking of property without due process of law.

See, also, the following cases where statutes levying unjust and unreasonable penalties were declared unconstitutional by the Supreme Court of the United States on the ground that they deprived the defendant of its property without due process of law:

Ex parte Young 209 U. S. 123, 52 L. Ed. 714.

Chicago M. & St. P. R. Co. v. Polt, 34 S. Ct. 301, 232 U. S. 165, 58 L. Ed. 554.

Chicago M. & St. P. R. Co. v. Kennedy, 34 S. Ct. 463, 232 U. S. 626, 58 L. Ed. 762.

Southwestern Telegraph & Telephone Co. v. Donaher, 35 S. Ct. 886, 238 U. S. 482, 59 L. Ed. 1419.

VIII.

CONCERNING DECISIONS UP-HOLDING THE VALIDITY OF THE ALABAMA HOMICIDE STATUTE.

The Supreme Court of Alabama upheld the constitutionality of the Homicide Statute in the case at bar. It did not pretend to dispose of the arguments advanced against the constitutionality of the statute, but was content to rest its decision upon the citation of two cases, which will now be discussed in their order. Louis Pizitz Dry Goods Co. v. Yeldell. (See Record, page 51; 104 So. 526, 527, 213 Ala. 222).

The first case cited was that of Richmond and Danville Railroad Company v. Freeman, 97 Ala. 289. 11 So. 800. There is no suggestion in that case that the statute was in conflict with the 14th Amendment. Therefore, the Richmond & Danville R. R. case 97 Ala. 295, 11 So. 800, is not authority for the proposition that the Homicide Statute is not contrary to the 14th Amendment. In the Richmond & Danville R. R. case the Alabama Supreme Court considered the Homicide Statute with regard to certain constitutional provisions in the local constitution of the State of Alabama, such as those which relate to arrest, arraignment, conviction and punishment for the violation of the criminal law. It is significant that the Alabama Supreme Court emphasized in its opinion that *"the whole policy of our laws, as of every civilized system of jurisprudence, is utterly at war with the idea of vicarious punishment, while the policy of enforcing compensation for wrongs done out of the estate of the wrong-doer is not opposed to any abstract notion of justice or to the practice of any theory*

of government." The injustice and absurdity of the Homicide Statute was recognized by the Court, as its shown by the following excerpt from the case, but the Court felt that the question of the constitutionality of the statute and its proper construction had been foreclosed. The judge who wrote the opinion expressed himself as follows:

> "The question, in his opinion, is no longer an open one. If it were, he should be much inclined to the view so ably urged by counsel, that the statute was primarily intended to afford compensation to the next of kin of a person coming to his death through the wrong of another, and to allow the imposition of punitive damages only in those cases where they would have been recoverable had the injury fallen short of death. He is disposed to think that a too far-reaching influence was accorded to the title of the act; and if this case were here upon first impression, he would be strongly inclined to rule that the legislative intent was to prevent homicides by giving an action for fatal injuries as to which no right of action existed before where the next of kin of the slain were in fact losers by his death, the recovery to be tolled by their loss unless the circumstances of the wrongful act warranted the imposition of additional damages as a punishment under well established common-law principles. It is manifest that this construction would conserve the expressed legislative purpose "to prevent homicides", since it attached a new and previously non-existing liability to all wrongful acts producing death, would be more in harmony with general legal theories and precedents, and give what the writer conceives to be, a more reasonable field for the operation of the limitation of

> the right of action to cases in which the deceased might have recovered had the injury not been fatal. It would seem too, that this view should find some support in the provision giving direction to the sum recovered; and certainly it is strongly supported by that clause of the statute which provides that "the action shall not abate by the death of the defendant but may be revived against his personal representatives," since in such case, there could be no punishment of the wrong doer but only of wholly innocent successors to his estate."
>
> Richmond & Danville R. R. Co. v. Freeman, 97 Ala. 289, at page 296; 11 So. 802.

The second case cited by the Supreme Court of Alabama was that of the U. S. Cast Iron Pipe & Foundry Company vs. Sullivan, 3 Fed. (2nd Ed.), page 794, decided by the U. S. Circuit Court of Appeals, 5th Circuit. It is not altogether clear from the opinion in the Sullivan case whether the negligence charged and relied upon was the negligence of the corporate defendant itself. That is, whether it was a corporate act or omission, or whether the negligence charged was against the defendant on the doctrine of respondent superior for the dereliction of its servant or agent. The Court of Appeals uses the following language in its opinion:

> "In behalf of the defendant it is contended that that statute is violative of the Fourteenth Amendment to the Constitution of the United States in that it denies due process of law to those sought to be charged with liability because it imposes punishment on them though they may be without fault. We are of opinion that there is no merit to this contention. In the absence of statute punitive or exemplary dam-

> ages are recoverable in civil actions for certain kinds of wrongful conduct. It is clearly within legislative competency to give a civil right of action for the negligent or wrongful killing of a human being, and to make the wrong-doer liable for punitive or exemplary damages. Richmond & Danville R .Co. v. Freeman, 97 Ala. 289; Ala. Power Co. v. Talmadge, 207 Ala. 86, 97."

The quoted language indicates that the Court of Appeals regarded the defendant itself as guilty of the negligence. The defendant apparently assumed voluntarily the duty which it failed to perform. It is one thing to make the "wrong-doer liable for punitive or exemplary damages," and quite another thing to make an innocent party liable for such penalty in "whatever amount the jury may assess."

The value of the decision of the Court of Appeals in the Sullivan case is appreciably lessened by the fact that it cites the cases of Richmond & Danville R. Co. v. Freeman, 97 Ala. 289, 11 So. 800 and Alabama Power Company vs. Talmadge, 207 Ala. 86, 93 So. 548 in support of the proposition that the Homicide Statute is not violative of the Fourteenth Amendment, when those two cases did not deal with that question. As pointed out in this brief supra, the 14th Amendment was not considered by the Supreme Court of Alabama in the Richmond & Danville R. Co. v. Freeman case, and in the case of Alabama Power Company vs. Talmadge, supra, the constitutionality of the Homicide Statute was not even considered or discussed. In the Talmadge Case the Supreme Court of Alabama, by virtue of an existing statute, reduced the judgment of the trial court from $27,500.00 to $17,500.00, on the ground that the jury was influenced

by passion or prejudice. Except for the finding by the Supreme Court that the verdict had been influenced by passion or prejudice it would not have reduced the judgment. It was contended that the statute which gave the Supreme Court of Alabama the general power to reduce judgments was violative of the 14th Amendment, but the court held that it was not. A careful reading of the opinion and the head notes in the Talmadge case will show that the only statute, the constitutionality of which was there considered, was the one allowing the Supreme Court of Alabama to reduce the amount of the judgment rendered in the trial court.

A writ of certiorari was denied on May 11th, 1925, in the Sullivan case by the U. S. Supreme Court. 268 U. S. 696, 69 L. Ed. 1162.

This denial of the writ of certiorari by the Supreme Court in the Sullivan case was not equivalent to a decision on the merits. The granting of the writ was discretionary, and the granting of the writ would be preliminary to any decision on the merits of the case by the Supreme Court.

We know of no statute with all the features and characteristics of the Alabama Homicide Statute. And, aside from the Sullivan case, supra, we know of no case which has raised the question of the constitutionality of the Homicide Statute with reference to the 14th Amendment.

For the foregoing reasons we respectfully submit that the writ of error should be granted and the judgment of the Supreme Court of Alabama reversed.

Respectfully submitted,

J. P. Mudd

Copy served on Beddow & Ray attorneys for defendant in error
J. P. Mudd

FILED
JAN 24 1927
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM
1926

NO. 171

LOUIS PIZITZ DRY GOODS COMPANY, A CORPORATION, *Petitioner* (Appellant)

vs.

WILLIS YELDELL, AS ADMINISTRATOR OF THE ESTATE OF CARRIE YELDELL, *Respondent* (Appellee)

BRIEF OF BEDDOW & RAY AND HUGO L. BLACK, *Attorneys for Respondent.*

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STATEMENT OF THE CASE

The Louis Pizitz Dry Goods Company, a corporation, has applied to this court for a Writ of Error addressed to the Supreme Court of Alabama. The defendant company seeks to have this Court declare the Homicide Act of Alabama unconstitutional because it is contended that said Act violates Section One of the Fourteenth Amendment to the Federal Constitution. The attack made by petitioner on the Homicide Act is based on two assumptions:

1. The application of the Homicide Act of Alabama deprives the company of its property without due process of law because it awards punitive damages for the wrongful act of an agent regardless of participation in it or ratification of it by the principle.

2. The Homicide Act constitutes an unwarranted exercise of the police power of the state because the amount of damages is left to the reasonable discretion of the jury.

The Homicide Act of Alabama now before the Court for review reads as follows :

"5696. ACTION FOR A WRONGFUL ACT, OMISSION OR NEGLIGENCE CAUSING DEATH.—A personal representative may maintain an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission or negligence of any person or persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence if it had not caused death.—"

PROPOSITION NUMBER ONE

THIS APPEAL IS UNNECESSARY BECAUSE THE QUESTIONS RAISED HAVE BEEN SETTLED ADVERSELY TO THE APPELLANT IN BOTH STATE SUPREME COURT AND THE SUPREME COURT OF THE UNITED STAES.

Richmond & Danville R. R. Co. vs. Freeman, 97 Ala. 289.

Southern R. R. Co. vs. Bush, 122 Ala. 470.

Alabama Power Co. vs. Talmadge, 207 Ala. 86.

Alabama Power Co. vs. Talmadge, 259 U. S. 575.

United States Cast Iron Pipe & Foundry Co. vs. Sullivan, 3 F. (2nd) 794.

United States Cast Iron Pipe & Foundry Co. vs. Sullivan, 69 Law Ed. 1162.

Louis Pizitz Dry Goods Co. vs. Yeldell, 213 Ala., 222.

ARGUMENT

We contend that the Federal questions sought to be raised are frivolous and do not constitute sufficient ground for the issuance of the Writ.

HISTORY AND CONSTRUCTION BY STATE COURT OF THE HOMICIDE ACT

The Homicide Act of Alabama became effective in 1872. It has been recognized as valid by bench and bar for more than fifty years. Under the Statute, cases in countless numbers have been settled or litigated. Indeed, this Act has been construed by both the State Court and the Federal Court. In every instance the Act has been upheld.

The Homicide Act of Alabama first came before the Supreme Court of that state in 1877. At that time the Supreme Court of Alabama construing the Act in the case of *Savannah and Memphis Railroad Company vs. Sherer,* 58 Ala. 672, in the last paragraph of the opinion, used these words:

> "Lacerated feelings of surviving relations, and mere capacity of deceased to make money if permitted to live, do not constitute the measure of recovery under the Act of February 5th, 1872. Prevention of homicide is the purpose of the Statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.' The damages are punitive and they are none the less so, in consequence of the direction the Statutes gives to the damages when recovered. They are assessed against the railroad *'to prevent homicides.'* "

At the same term of the Supreme Court of Alabama, that court had under consideration the Homicide Act again in the case of the *South and North Alabama Railroad Company vs. Sherer,* 59 Ala. 272. In that case, the same court quoted with approval the language used in the case of *Savannah and Memphis Railroad Company vs. Sherer, supra,* and added the following language as a further definition of the meaning of this Act:

> "Preservation of life—prevention of its destruction by the wrongful acts or omission of another—is the subject of the statute; and all its provisions are but machinery for carrying it into effect."

From the foregoing opinions, it will be observed that the Supreme Court of Alabama, judicially declared that the damages assessed by a jury under the Homicide Act are punitive in their nature and that the purpose of the Act was "to prevent homicides." That court further declared that the Act in question had for its purpose the preservation of life and the prevention of its destruction by the wrongful acts or omission of another and further declared that the Homicide Act itself was but the machinery for carrying into effect the worthy object of the Act. It may be said, therefore, that the Act is remedial in its nature.

In 1892, this Act came before the Supreme Court of Alabama for the first time on a constitutional question. The Supreme Court of that state delivered a lengthy and well considered opinion which has been the settled law of the Homicide Act since that date. The opinion may be found in the case of *Richmond and Danville Railroad*

Company vs. Freeman, 97 Ala. 289, wherein the Supreme Court said:

> "The objection taken on constitutional grounds to the Statute as it has been construed by this court seems to us to be without merit. It is as clearly within legislative competency, of course, to punish negligence as it is to punish wantonness, wilfulness or intentional wrongdoing. It is not controverted at all that the common-law doctrine by which the imposition of punishment through a recovery at the suit of an individual or exemplary damages for wanton, wilful or intention misconduct is allowed, is well within organic limitations; and we conceive no basis for the distinction between the power to punish in this way for negligence and such power in respect of wantonness and the like when brought to the touch of constitutional guarantee intended to secure to the citizen certain rights as to the proceedings necessary to his arrest, arraignment, conviction and punishment for a violation of criminal law."

Considering the Freeman case, *supra,* it will be observed that the Supreme Court of Alabama, judicially determined that the Homicide Act of Alabama gives a cause of action where formerly none existed (a) for any wrongful act, omission or negligence causing death (b) that the damages recoverable under the act are punitive in their nature, regardless of whether the wrongful act is negligent, wanton or wilful (c) that the worthy purpose underlying the Act itself is "to prevent homicides" in Alabama.

The damages recoverable under the Homicide Act are not a penalty notwithstanding the fact that Counsel for Appellant has repeatedly termed them such in his

printed brief. This Court will not be misled by this erroneous distinction found in brief of Appellant. Indeed, it has been judicially determined that the damages are punitive in their nature but do not constitute a penalty. In 1898, the Supreme Court of Alabama met this very contention while construing this Act in the case of *Southern Railroad Company vs. Bush,* 122 Ala. 470. In that opinion, the court said

> "If the damages recoverable in an action of this character were, strictly speaking, a penalty imposed by law, we would be inclined to give to our constitutional provision on the subject the same construction that has been placed on the similar provision of the Federal constitution, and to hold that the defendant could not be compelled, even by statute, to give or furnish evidence in aid of a recovery against it. But while the damages recoverable are undoubtedly, under our former rulings, punitive in their nature, and not compensatory, they are not, in a strict sense, a penalty, nor is the action penal, or quasi-criminal, within the meaning of the constitutional provisions as above construed. *The statute is remedial, and not penal,* and was designed as well to give a right of action where none existed before, as to 'prevent homicides' and the action given is purely civil in its nature for the redress of private, and not public wrongs. See *Richmond and Danville Railroad Company vs. Freeman,* 97 Ala. 289. The question presented is, therefore, one of statutory and not of constitutional construction."

From the foregoing history and judicial construction of the Homicide Act, it would appear (a) that the object of the Act was to preserve life or to prevent homicides in Alabama, (b) that the damages assessed under the Act

are punitive in their nature, (c) that the amount of damages depend upon the nature of the circumstances; in all cases being addressed to the sound discretion of the jury, (d) that the Statute is remedial in its nature and not penal or that the action given is purely civil in its nature for the redress of private rather than public wrongs.

We insist that the object of the Statute is constitutional and that the machinery adapted to the accomplishment of that object is likewise constitutional. Both the object and the remedy have been approved by the Supreme Court of Alabama.

Apparently it is the contention of counsel for appellant that the construction placed on the Homicide Act by the Supreme Court of Alabama is wrong. In this contention, it is our understanding that the Supreme Court of the United States will offer him no comfort. In the recent case of *Hebert vs. State of Louisiana,* decided on November 1st, 1926, by the Supreme Court of the United States as found in the Advance Sheet of the Supreme Court Reporter in Volume 47, page 103, this court said:

> "The Supreme Court (meaning the Supreme Court of Louisiana) sustained that construction, and the accused contend here, as they did in that court that the construction was wrong, and being wrong, operated as a denial of due process of law in the sense of the Fourteenth Amendment. The contention must be overruled. Whether the state statute must be construed one way or another is a state question, the final disposition of which rests with the courts of the state. The due process of law clause in the

> Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires nor does it enable this court to revise the decisions of the state courts on questions of state law. All it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principals of liberty and justice which lie at the base of all civil and political institutions and not infrequently are designated as 'law of the land.' Those principals are applicable alike in all the states and do not depend upon or vary with the legislation."

HISTORY AND CONSTRUCTION BY FEDERAL COURT OF THE HOMICIDE ACT

We now come to consider the Federal view of this Act. That portion of Section One of the Fourteenth Amendment to the Constitution of the United States about which the Appellant complains is set forth in the following language:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As we understand this appeal, the Appellant is aggrieved because he argues that punitive damages for the wrongful act or omission of an agent of a corporation is repugnant to Section One of the Fourteenth Amendment to the Constitution of the United States.

This is the third time this contention has come before the Supreme Court of the United States in one form or another since the world war. It is our judgment that counsel for the Appellant has become involved in a question more of legal fancies and nice distinctions than of substantive or adjective law. We contend that the Federal question sought to be raised in this appeal is frivolous.

In the case of *Alabama Power Company vs. Talmadge,* 207 Ala. 86—93 So. 548, the Appellant sought to raise a Federal question in the state courts of Alabama. The contention was lost as will be noted by reading the opinion of the Supreme Court of Alabama. That case then came before the Supreme Court of the United States on a Writ of Error directed to the Supreme Court of Alabama. On May 15th, 1922, the Supreme Court of the United States in a memorandum opinion dismissed the appeal for want of jurisdiction. The headlines to the memorandum opinion by the entire court indicated that the Federal question sought to be raised was frivolous.

Alabama Power Co. vs. Talmadge, 259 U. S. 575.

In the case of the *United States Cast Iron Pipe and Foundry Company vs. Sullivan,* 3 F. (2nd) 794, this same alleged Federal question was raised before District Judge William I. Grubb, sitting in the Northern District of Alabama. There was judgment against the defendant company in said court and the defendant company applied for a Writ of Error to the Circuit Court of Appeals, Fifth Circuit. There was an opinion by that court deny-

ing the Writ. The defendant company then applied to the Supreme Court of the United States for a Writ of Certiorari directed to the Circuit Court of Appeals, Fifth District. On May 11th, 1925, the Supreme Court of the United States in a second memorandum opinion on this same alleged Federal question denied the Writ of Certiorari. Here we have Federal sanction of the act. What more can be expected?

United States Cast Iron Pipe and Foundry Co. vs. Sullivan, 3 F. (2nd) 794.
United States Cast Iron Pipe and Foundry Co. vs. Sullivan, 69 Law Ed. 1162.

In 3 F. (2nd) 794, will be found the opinion of the Circuit Court of Appeals, Fifth District. In the case of the *United States Cast Iron Pipe and Foundry Company, supra,* in speaking of the identical question now sought to be raised, that Division of the Federal Court said:

> "In behalf of the defendant, it is contended that the Statute is violative of the Fourteenth Amendment of the Constitution of the United States in that it denies due process of law to those sought to be charged with liability because it imposes punishment on them though they may be without fault. We are of the opinion that there is no merit in this contention. In the absence of the Statute, punitive or exemplary damages are recoverable in civil actions for certain kinds of wrongful conduct. It is clearly within the Legislative competency to give a civil right of action for the negligent or wrongful killing of a human being and to make the wrongdoers liable for punitive or exemplary damages."

United States Cast Iron Pipe and Foundry Company vs. Sullivan, 3 F. (2nd) 794.

We repeat that this is the third time this question, to our knowledge, has been before the Supreme Court of the United States since the world war. Counsel for Appellant cannot escape knowledge of this fact. It would appear to us that counsel is now before the Supreme Court of the United States again imploring this court "to revise the decisions of the state courts on questions of state laws." If counsel for appellant is correct in his contention, in the case at bar, we see no reason why every state statute in the forty-eight states of the Union cannot with equal propriety come to this court for final construction.

THE FEDERAL QUESTION NOW SOUGHT TO BE RAISED IN THIS CASE HAVING BEEN BEFORE THIS COURT ON PRIOR OCCASIONS PRESENTS NOTHING NEW.

But Appellant insists that the Homicide Act stands as the law of Alabama in violation of the Fourteenth Amendment to the Federal Constitution for two reasons: (1) Because the Homicide Act of Alabama deprives the company of its property without due process of law because in its nature it awards punitive damages for the wrongful act or omission of an agent without the fault of the principal. (2) The Homicide Act constitutes an unwarranted exercise of the police power of the Legislature because the amount of damages is left to the reasonable discretion of a jury.

We shall briefly note these two propositions in the order named.

There is abundant authority found in many states for the proposition that punitive damages are allowed agaisnt a corporation for the act or omission of its agent, regardless of whether said corporation participated in, ratified or authorized said act or omission.

Goddard vs. Grand Trunk Railway of Canada, 57 Maine 202.
Selman vs. Barnett, 4 Ga. App. 374, 61 S. E. 501.
Hawes vs. Knowles, 114 Mass. 578, 19 Am. Rep. 383.
The Jeffersonville R. R. Co. vs. Rogers, 38 Ind. 116.
10 Am. Rep. 571.

The Supreme Court of Alabama has construed the Homicide Act as permitting punitive damages in cases of homicide and it makes no difference whether the wrongful act or omission was intentional, wanton, or negligent. Under that Act, a case may go to the jury under either of the three averments just named. It stands to reason that in three given cases where one alleged negligence and the other alleged wanton conduct and the third alleged intentional conduct, that a jury in their sound discretion would be authorized to assess damages depending upon the aggravation or degree of the wrongful act or omission.

However, according to the contention of Counsel for the Appellant he would seek to strike down this Act and thus in cases of homicide prevent a case from going to a jury only in the event that the Act or omission of an agent had been ratified or authorized by a corporation itself. We think that Counsel for Appellant is led to this

extremity because of his failure to correctly interpret the case of *Lake Shore and Michigan R. R. Company vs. Prentice,* 147 U. S., page 101. In that case, this Court at the very outset used this language:

> "The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and objectionable conduct of a conductor of one of its trains toward a passenger—this question, like others, affecting the liability of the railroad corporation as a common carrier of goods and passengers—is a question not of local law but of general jurisprudence from which this court, *in the absence of express statute regulating the subject,* will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."
>
> *Lake Shore and Michigan So. R. R. Co. vs. Prentice,* 147 U. S., page 101.

Careful reading of the Lake Shore case, *supra,* will clearly demonstrate the universal Federal rule applied in this country but this rule is plainly stated by the Court to apply only in the absence of express statute. The difference in the case at bar lies wholly in the fact that there is an express statute governing in the "State of Alabama and not elsewhere," to use the very language of the statute itself. In fact, it has been our understanding since coming before the Federal bar that every Federal District judge in the United States always inquires as to the express statutes existing in the state where trial is being had, even in the Federal District courts, and unless there is a Federal law to the contrary, always follows the state statute in the given local juris-

diction. It is our contention that the Lake Shore case has no application whatsoever to the case at bar. It logically follows to our mind that if the Legislature of Alabama had a right to allow punitive damages for the intentional act of an agent or the wanton act of an agent without the ratification of the company itself, then it had a right to allow punitive damages under the same Act for the simple negligence of an agent whether ratified by a corporation or not. To hold otherwise would strike down the entire state system and require the State of Alabama to follow the Federal rule in the absence of statute as announced in the Lake Shore case, *supra*. Such a contention is inconceivable.

The Supreme Court of Alabama well said in the Freeman case, *supra*:

> "It is not controverted at all that the common law doctrine by which the imposition of punishment through a recovery at the suit of an individual of exemplary damages for wanton, wilful, or intentional misconduct is allowed, is well within organic limitations; and we conceive no basis for the distinction between the power to punish in this way for negligence and such power in respect of wantonness and the like when brought to the touch of constitutional guarantee."

The Circuit Court of Appeals, Fifth District, gave Federal sanction to the same logic when it used the following words in the Sullivan case, *supra*:

> "It is clearly within legislative competency to give a civil right of action for the negligent or wrongful killing of a human being and to make the

wrongdoers liable for punitive or exemplary damages."

We next turn to the question of police power. The Appellant in his contention argues that there is an unwarranted use of said power.

The Supreme Court of Alabama has said that the purpose of the act is to prevent homicides; that the object of the act is the protection of the life and safety of the public. It is, therefore, the exercise by the State Legislature of the police power of the state.

The question then arises—has the State overstepped the exercise of its police power? We think the rule is that if the object of a police measure is lawful then the machinery under the due process clause of the Fourteenth Amendment is lawful. But the machinery chosen must be reasonably adapted to the accomplishment of that object. Certainly the machinery must not be arbitrary or unreasonable. The chief complaint of Counsel for Appellant appears to be that there is an unwarranted exercise of police power because it fixes the amount of damags at "such damages as the jury may assess." Counsel argues that a jury can assess an unlimited amount and that the Supreme Court of Alabama has never set aside a verdict on the ground that it was excessive and many other criticisms are made of the manner in which this statute operates in Alabama. A careful examination of the decisions will indicate how unreasonable this contention is on the part of the Appellant.

Ala. Power Co. vs. Talmadge, 207 Ala. 86; 93 So. 548.

It must not be lost to view in this case that the deceased bore no relation to the defendant but was an utter stranger. There was no question of compensation under industrial laws or of employer and employee. The Appellant was operating a public place of business. The intestate entered this place of business as an invitee. The highest degree of care was due her when she entered the elevator in this instance.

It has been a part of our legal training to look upon a jury trial as the pride of American jurisprudence and we see no reason for complaint that the damages in this case were left to the sound discretion of a jury.

The Supreme Court of the United States in *Day vs. Woodworth,* 13 Howard 363, in speaking of the power of a jury to award punitive damages, said:

> "This has always been left to the discretion of the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of each case."

We do not undertake to bring any new ideas to the Supreme Court on the question at issue in this case. All we have attempted to do has been to read a number of cases with a view to pointing out what we think is the logical conclusion of the entire matter. By doing this, we shall not drift afield. In support of our contentions, we call the court's attention to a few decisions which we think contain the rules applicable to this case.

In *Lindsley vs. Natural Carbonic Gas Company,* 55 Law Ed. 369, this court said, while considering this question:

"The rules by which this contention must be tested as is shown by repeated decisions of this court are these: (1) The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws but admits of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore, is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. (3) When the classification in such a law is called in question if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, (4) one who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary."

In *Rawlins vs. State of Georgia,* 50 Law Ed. 899, the Court said:

"At the argument before us, the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provision of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decisions of the state court that the local provisions have been complied with. This is a mistake. If the state constitution and laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further. *The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms.*"

In *Barbier vs. Conolly,* 113 U. S. 923, the Supreme Court of the United States seems to have covered the entire question involved in the present appeal with the following language:

> "The Fourteenth Amendment in declaring that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws undoubtedly intended, not only that there should be no arbitrary deprivations of life or liberty or arbitrary spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property; prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the state; develop its resources and add to its wealth and prosperity. From the very necessities of society; legislation of a spe-

cial character having these objects in view must often be had in certain districts such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another but they are designed not to impose unequal or unnecessary restrictions upon anyone but to promote with as little individual inconvenience as possible the general good. Though in many respects, necessarily special in their character, they do not furnish just ground of complaint as they operate alike upon all persons and property under the same circumstances and conditions. Class legislation discriminating against some and favoring others is prohibited; but legislation which in carrying out a public purpose is limited in its application if within the sphere of its operation it affects alike all persons similarly situated is not within the amendment."

In *Lawton vs. Steele,* 152 U. S. 133, this court said:

> "An act of the Legislature which has for its object the preservation of the public interest against the illegal depredations of private individuals ought to be sustained unless it is plainly violative of the Constitution or subversive of private rights."

In *Holden vs. Hardy,* 169 U. S. 366, this court used the following language which aptly applies to the case at bar:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one

side of this line there may be a right of trial by jury and on the other, no such right. Each state prescribes its own methods of judicial proceeding."

From the foregoing Federal authorities, we conclude that the State of Alabama under the reasonable exercise of its police power had the right to enact the law in question; that the Homicide Act is uniform in its application and that every citizen of the State stands alike before that act; and that no citizen can complain that his property is taken from him under this act without due process of law as the Statute has been construed and applied.

Counsel for Appellant has cited four cases, a careful reading of which leads us to feel that they have no application to the case at bar. They are as follows:

Lake Shore and Mich. R. R. Co., 147 U. S. 101.
Mo. Pac. Railway Co. vs. J. W. Tucker, 230 U. S. 340.
Arizona Copper Co. vs. Hammond, 250 U. S. 400.
United States vs. Cohen Grocery Company, 255 U. S. 81.

The constitutional questions sought to be raised on this appeal have been repeatedly raised and denied both in the State and Federal court. We feel justified in asking this court for the interest and damages provided in Rule 28 of the Supreme Court of the United States. We quote Paragraph Two of Rule 28:

"In all cases where a Writ of Error shall delay proceedings on the judgment of the lower court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent in addi-

tion to interest may be awarded upon the amount of the judgment."

Judgment in this case was for Ninety Five Hundred ($9500.00) Dollars. The judgment is over two years old. Our client has been denied the fruits of his verdict for more than eighteen months. The Supreme Court of Alabama affirmed the case promptly upon submission. We insist that the Federal questions raised on this appeal are not substantial as stated by Mr. Justice Holmes in the case of *Avent vs. U. S.*, 266 U. S. 127:

> "The right to come here depends upon the presence of some substantial constitutional question. But so far as such questions are raised, we are of the opinion that they are not substantial in view of previous decisions."

The attack in this case is hardly serious enough to justify a defense and certainly it is not strong enough to call into question this ancient statute for the purpose of striking it down. Every presumption is indulged in favor of the constitutionality of the act. There is no element of injustice and moral wrong in holding a corporation liable in punitive damages for the act of its agent resulting in the death of a citizen. Experience of more than fifty years indicates that every practical consideration supports the validity of the Homicide Act of Alabama.

Respectfully submitted,

Beddow & Ray and Hugo L. Black

BEDDOW & RAY AND HUGO L. BLACK,
Attorneys for Respondent.

I hereby certify that a copy of the foregoing Brief and Argument has been served upon Hon. Joseph P. Mudd, of Birmingham, Alabama, Counsel for Appellant.

This the 27 day of January, 1927.

Beddow & Ray & Hugo L. Black

BEDDOW & RAY AND HUGO L. BLACK,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1926.

Louis Pizitz Dry Goods Company, Inc., *vs.* Willis Yeldell, as Administrator of the Estate of Carrie Yeldell, deceased. } In Error to the Supreme Court of the State of Alabama.

[April 11, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Defendant in error, an administrator, brought suit in the circuit court of Jefferson County, Alabama, to recover for the wrongful death of his intestate, caused by the negligent operation of an elevator by an employee of plaintiff in error in its department store. The action was founded upon the so-called Homicide Act of Alabama, § 5696, Code of 1923, printed in the margin.* This statute authorizes the recovery of damages from either a principal or an agent, in such amount as the jury may assess, for wrongful act or negligence causing death. The jury returned a verdict of $9,500 and judgment for that amount was affirmed on appeal. 213 Ala. 222. The case comes here on writ of error. Jud. Code, § 237, as amended.

Plaintiff in error does not deny its liability for the negligent act of its employee. But it calls attention to the fact that the Homicide

*"A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama and not elsewhere for the wrongful act, omission or negligence of any person or persons, or corporation, his or their servants, or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate."

Act imposing liability upon the employer for death resulting from the wrongful acts, omissions or negligence of its employees, as interpreted by the state courts, permits the jury, as in this case, to assess punitive damages against the employer for the mere negligence of its employee. *Richmond & Danville R. R.* v. *Freeman*, 97 Ala. 289. A statute which so authorizes the mulcting of the employer, it is argued, is "unreasonably oppressive, arbitrary, unjust, violative of the fundamental conceptions of fair play, and, therefore, repugnant to the Fourteenth Amendment."

The legislation now challenged has been on the statute books of Alabama in essentially its present form since 1872. The liability imposed is for tortious acts resulting in death, but the damages, which may be punitive even though the act complained of involved no element of recklessness, malice or wilfulness, may be assessed against the employer who, as here, is personally without fault. The Supreme Court of Alabama has repeatedly ruled that the statute is aimed at the prevention of death by wrongful act or omission. *Savannah & Memphis R. R.* v. *Shearer*, 58 Ala. 672, 680; *South and North Alabama R. R.* v. *Sullivan*, 59 Ala. 272, 279. "The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides', and the action given is purely civil in its nature for the redress of private, and not public wrongs." *Southern Ry.* v. *Bush*, 122 Ala. 470, 489. In defining the scope of the act, the state court has pointed out that the extent of the culpability and the amount of the verdict are for the jury and that its finding is not to be disturbed unless the verdict is "induced or reached on account of prejudice, passion, or other improper motive or cause." *Mobile Electric Co.* v. *Fritz*, 200 Ala. 692, 693. The case was argued here on the assumption that its scope was thus limited and we so interpret the statute. Its constitutionality has been upheld by both state and federal courts. *Richmond & Danville R. R.* v. *Freeman, supra; U. S. Cast Iron Pipe & Foundry Co.* v. *Sullivan*, 3 Fed. (2d) 794.

The objections now urged to a new form of vicarious liability were considered and rejected in the Workmen's Compensation cases, *New York Central R. R.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, as they must be rejected here. The extension of the doctrine of liability without fault to new situations to attain a permissible legislative ob-

ject is not so novel in the law or so shocking "to reason or to conscience" as to afford in itself any ground for the contention that it denies due process of law. The principle of *respondeat superior* itself and the rule of liability of corporations for the wilful torts of their employees extended in some jurisdictions, without legislative sanction, to liability for punitive damages, *Boyer & Co.* v. *Coxen*, 92 Md. 366; *Hanson* v. *E. & N. A. R. R.*, 62 Me. 84; *Jeffersonville R. R.* v. *Rogers*, 38 Ind. 116; *Atlantic & Great West. Ry.* v. *Dunn*, 19 Ohio St. 162; see *Jefferson County Savings Bank* v. *Eborn*, 84 Ala, 529, 534; *contra, Lake Shore Ry.* v. *Prentice*, 147 U. S. 101, are recognitions by the common law that the imposition of liability without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law. No constitutional question was presented in *Lake Shore Ry.* v. *Prentice, supra*, and this Court thus was free to choose as between these conflicting common law rules the one which it thought most appropriate.

Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen's Compensation Acts imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented. See *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281; *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33, 43; *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60; cf. *Van Oster* v. *Kansas*, 272 U. S. —. Or it may impose on the business or enterprise in which such loss of life occurs the economic burden of the protective measure adopted, *New York Central R. R.* v. *White*,

supra; Second Employers' Liability Cases, 223 U. S. 1; or return to and substitute the common law method of permitting the jury to fix the amount of recovery, at least to the extent of an exercise of its reasonable judgment, for the present-day method of weighing and measuring the value of human life.

The distinction between punitive and compensatory damages is a modern refinement. The first use of the term "exemplary damages" is ascribed to Lord Camden in *Huckle* v. *Money,* 2 Wils. 205. See Sedgwick, Damages, § 348. Although sporadic instances of new trials being ordered because the verdict was excessive may be found in the early common law, see *Wood* v. *Gunston,* Style, 466; *Chambers* v. *Robinson,* 2 Stra. 691, it was not until much later that the formal practice developed, *Duberley* v. *Gunning,* 4 T. R. 654; *Wilford* v. *Berkeley,* 1 Burr. 610; Mayne, Damages, 691, and the fixed rules of damage evolved.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.